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# Prometheus Unbound: Accepting a Mythless Concept of Civil In Rem Forfeiture With Double Jeopardy Protection

AMY D. RONNER†

## INTRODUCTION

In the Greek tragedy, Zeus bound Prometheus to a precipice and commanded an eagle to devour the defiant protagonist's liver during the day.<sup>1</sup> According to myth, the liver would fully rejuvenate each night so that the torture could begin anew at dawn.<sup>2</sup> The Nineteenth Century poet, Percy Bysshe Shelley, has Prometheus bewail his own agony:

Almighty, had I deigned to share the shame  
Of thine ill tyranny, and hung not here  
Nailed to this wall of eagle-baffling mountain,  
Black, wintry, dead, unmeasured; without herb,  
Insect, or beast, or shape or sound of life.  
Ah me! alas, pain, pain ever, for ever!  
No change, no pause, no hope! Yet I endure.  
I ask the Earth, have not the mountains felt?  
I ask yon Heaven, the all-beholding Sun,  
Has it not seen? The sea, in storm or calm,  
Heaven's ever-changing Shadow, spread below,  
Have its deaf waves not heard my agony?  
Ah me! alas, pain, pain ever, for ever!<sup>3</sup>

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† Associate Professor of Law, St. Thomas University School of Law; J.D., 1985, University of Miami; Ph.D., 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College. I would like to dedicate this article to a superb human being, my friend, Art Furia. I am also most grateful to my research assistants, Deby Raccina, Renee Duff and Kelly Muga. I would also like to thank Jack Denaro, Bruce Winick and Beth Weitzner, all of whom were generous with their time and their thoughts.

1. Prometheus appears in HESIOD, *THE THEOGONY* 68 (Norman O. Brown trans., 1953) ("Cunning Prometheus he bound with unbreakable and painful chains and drove a stake through his middle. And he turned on him a long-winged eagle, which ate his immortal liver; by night the liver grew as much again as the long-winged bird had eaten in the whole day."). According to the translator, portions of this section are not part of the original poem. See also Aeschylus, *Prometheus Bound*, in *SEVEN FAMOUS GREEK PLAYS* 1 (Whitney J. Oates et al. eds. & Paul More trans., Modern Library 1950).

2. HESIOD, *supra* note 1, at 68.

3. Percy Bysshe Shelley, *Prometheus Unbound*, in *ENGLISH ROMANTIC WRITERS* 983

Shelley has indeed captured what the Greeks saw as the quintessence of severe punishment—namely, redundancy. In fact, the same awareness resides in the Double Jeopardy Clause of the Constitution.<sup>4</sup> As a rule of finality, which ensues from a fear of governmental oppression,<sup>5</sup> the Clause prevents an effectually deific prosecution from sentencing an already acquitted or convicted individual to the seemingly endless pain of reprosecution.

Before the decisions in *United States v. Halper*, *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*, when the same offense gave rise to separate criminal and civil forfeiture proceedings, the individual target could not really argue entitlement to the finality of double jeopardy protection.<sup>6</sup> As such, the government could freely seize the property of claimants who had already been acquitted or convicted of the very conduct giving rise to the forfeiture.<sup>7</sup> Alternatively, the government could pursue the civil forfeiture first and regardless of the outcome, seek a criminal conviction of the same claimant for

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(1967).

4. The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

5. See *infra* Part I.A.

6. The combined effect of three recent Supreme Court decisions, *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 509 U.S. 602 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), was to make double jeopardy protection available to a claimant facing civil in rem forfeiture before or after a criminal proceeding. See *infra* Part II.

7. Before *Halper*, the Supreme Court had rejected double jeopardy challenges to civil actions seeking sanctions for violations that were the subject of prior criminal proceedings. See generally *Helvering v. Mitchell*, 303 U.S. 391, 397 (1931) (In civil action to collect a tax deficiency and statutory penalty after defendant's acquittal for tax evasion, the Court said that the "acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."); *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) (explaining that the Double Jeopardy Clause is inapplicable to forfeiture proceeding where corporation had been convicted of criminal violations); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (a civil *qui tam* action against contractors that engaged in bid rigging after the defendants had been criminally convicted did not violate double jeopardy clause); *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956) (explaining that the statutory penalty liquidated damages and therefore, the action is civil). See also *United States v. Ward*, 448 U.S. 242, 248 (1980) (where the Court adopted a two-tiered test to determine whether a statute imposes a civil or criminal penalty); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (Court, applying *Ward* test, determined that Double Jeopardy Clause did not preclude forfeiture of property after the defendant was acquitted of the related criminal charges). See generally discussion *infra* Part I.C.

the very offense at issue in the civil suit.<sup>8</sup>

As this article will show, the historical inapplicability of constitutional provisions to civil forfeiture, the process by which the government confiscates property through an in rem action, is especially troubling for many reasons. Because civil forfeiture features so prominently in federal law and is highly profitable, the government's use of the congenial forfeiture mechanism is widespread.<sup>9</sup> Also, as one commentator has explained, one of the things that makes "[c]ivil forfeiture . . . especially attractive to law enforcement agencies . . . [is that] success demands very little in the way of proof or connection to actual wrongdoing."<sup>10</sup>

While there are at least one hundred different statutes authorizing civil forfeiture in a variety of criminal contexts,<sup>11</sup> the

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8. See *supra* note 6 (decisions deeming double jeopardy principles to be inapplicable to civil sanctions did not hinge on whether they preceded or followed criminal punishment). See also *infra* note 119.

9. See generally T. Michelle Ator, Note, 17 U. ARK. LITTLE ROCK L.J. 95 (1994); Alejandro Caffarelli, *Civil Forfeiture Hits Home: A Critical Analysis of United States v. Lot 5, Fox Grove*, 79 MINN. L. REV. 1447 (1995); William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087 (1994); Joy Chatman, Note, *Losing the Battle, But Not the War: The Future Use of Civil Forfeiture By Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS U. L.J. 739 (1994); Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles On the Constitution*, 39 N.Y.L. SCH. L. REV. 1 (1994); Rebecca Frank Dallet, *Taking the Ammunition Away From the "War on Drugs": A Double Jeopardy Bar to 21 U.S.C. § 881 After Austin v. United States*, 44 CASE W. RES. L. REV. 235 (1993); M. Lynette Eaddy, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. L. REV. 709 (1993); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of "The Innocent Owner"*, 70 NOTRE DAME L. REV. 369 (1994); Scott A. Hauert, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159 (1994); Steven L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 N.Y.L. SCH. L. REV. 205 (1994); Michael J. Munn, *The Aftermath of Austin v. United States: When Is Civil Forfeiture An Excessive Fine?*, 1994 UTAH L. REV. 1255; Douglas S. Reinhart, *Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235 (1994); James B. Speta, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection & the Eighth Amendment*, 89 MICH. L. REV. 165 (1990); Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95 (1994); Cynthia Sherrill Wood, *Asset Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States*, 29 WAKE FOREST L. REV. 1357 (1994).

10. Taifa, *supra* note 9, at 98. See also *infra* Part I.B.

11. Carpenter, *supra* note 9, at 1109-10, has summarized this as follows:

Many of these are directed at per se contraband, like unregistered dynamite, sawed-off shotguns, pornographic films, dying swine, the bacon, and magazines devoted to bestiality. Others are directed at derivative contraband, such as bald eagle eggs, whales, video-games that violate copyrights, smuggled potatoes, prison-made whips, Mayan temples, and untaxed whiskey. Other forfeitable items include vehicles used to import aliens; firearms used to kill animals in

civil drug forfeiture statute, 21 U.S.C. § 881, is often dubbed the "centerpiece."<sup>12</sup> Under § 881, the government, by combining the conveyance, asset and real property forfeiture provisions, can sometimes seize all of an individual's property.<sup>13</sup> In fact, this expansive breadth and the absence of the very procedural protections, which are afforded criminal defendants, have prompted § 881 critics to describe it as "[t]he H-Bomb in the war on drugs,"<sup>14</sup> which is "making civil liberties a casualty,"<sup>15</sup> as a "house of horrors"<sup>16</sup> or as a device in which the government has "seemingly unfettered authority."<sup>17</sup>

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national parks; vessels and gear used to poach halibut, seals and salmon; equipment used to counterfeit currency or coinage; vessels unloaded without a permit; vessels outfitted for smuggling; and containers, records, conveyances, manufacturing equipment, and real property used in drug violations. The proceeds of racketeering activity are forfeitable under RICO. A bank account consisting only partly of proceeds of illegal activity has been judged to be forfeitable in its entirety.

(footnotes omitted).

12. David J. Taube, *White Collar Crime Procedural Issues: Civil Forfeiture*, 30 AM. CRIM. L. REV. 1025, 1026-27 (1993).

13. See Franze, *supra* note 9, at 385 ("Forfeiture under section 881 clearly encompasses a broad array of property . . ."). W. David George explains in *Finally, An Eye for An Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States*, 46 BAYLOR L. REV. 509, 509 (1994):

Because § 881 allows the forfeiture of any asset used in a drug transaction, forfeitures have the potential of being excessive, in the sense that the punishment is not proportional to the crime. For example, an expensive yacht was seized by the government when one marijuana cigarette was found on board.

(footnotes omitted).

See also Speta, *supra* note 9, at 166-67 ("By combining the conveyance, asset and real property forfeiture provisions, the government, under section 881, can threaten to seize all of a person's property.") (footnote omitted).

14. Dallet, *supra* note 9, at 235-36 ("The H-bomb in the war on drugs is the federal civil drug forfeiture statute, 21 U.S.C. § 881, which may be brought without securing a criminal conviction and which provides little procedural protection to defendants.") (footnotes omitted).

15. *Id.* at 237.

16. Note, 104 HARV. L. REV. 1139 (1991).

17. Kessler, *supra* note 9, at 205. As Kessler explains, "greed" is indeed a motivating factor behind the frequent use of forfeiture:

Since 1985, the federal government has pocketed more than \$3.2 billion in forfeited assets. In its current inventory, the federal government has more than 31,698 pieces of property, real and personal, worth an estimated \$1.9 billion. From the business of the mechanic who repaired the drug dealer's cars to the \$50,000 house occupied by the welfare wife and seven-year old daughter while hubby/daddy serves a life sentence, forfeiture has become, well, routine.

*Id.* at 205-06. See also Cheh, *supra* note 9, at 3 ("[A]ccording to figures provided by the Justice Department's Executive Office for Asset Forfeiture, net deposits in the Asset Forfeiture Fund grew from \$93.7 million in 1986 to \$643.6 million, \$531 million, and \$555.7 million in 1991, 1992 and 1993, respectively."). As Cheh points out, forfeitures are

Because in civil forfeiture provisions, such as § 881, there is a heightened potential for governmental abuse<sup>18</sup> and because the Constitution, especially the Double Jeopardy Clause, serves to protect the accused against governmental overreaching,<sup>19</sup> it is lamentably ironic that history has withheld from the forfeiture claimant such constitutional safeguards in the very arena in which they are most needed. Specifically, with respect to the Double Jeopardy Clause, courts have created certain mythic notions about forfeiture and used them to keep the Constitution at a distance.<sup>20</sup> This article's main purpose is to explore not only the archaic forfeiture myths and their fledgling replacements, but also the United States Supreme Court's recent disturbing resurrection and apotheosis of the old myths. Within these contours, I advocate the acceptance of a mythless concept of civil in rem forfeiture, which would make the Double Jeopardy Clause available to a claimant whose alleged offense has given rise to both a criminal prosecution and a separate civil forfeiture action.

Part I of this article delves into the policies behind the Double Jeopardy Clause and emphasizes not only its role as the protector of an accused's interest in finality, but also its aim to prevent undue governmental harassment. In this context, I suggest that the Double Jeopardy Clause by itself is not devoid of myths. Specifically, courts have treated the Clause as containing a separate prohibition of multiple punishments for the same offense and also have interpreted that component as permitting the imposition of multiple punishments in a single proceeding as long as the "legislature specifically authorize[d the] cumulative punishment."<sup>21</sup>

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"highly profitable [because] . . . [i]n most forfeiture regimes, law enforcement agencies may sell what they seize and keep the proceeds." *Id.*

18. See generally discussion in Cheh, *supra* note 9; Dallet, *supra* note 9; Eaddy *supra* note 9; Franze, *supra* note 9; Hauert, *supra* note 9; Kessler, *supra* note 9; Munn, *supra* note 9; Stacy J. Pollock, Note, *Proportionality In Civil Forfeiture: Toward A Remedial Solution* 62 GEO. WASH. L. REV. 456 (1994); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process* 45 U. MIAMI L. REV. 911 (1991); Speta, *supra* note 9; Taifa, *supra* note 9.

19. See *infra* Part I.A.

20. See Piety, *supra* note 18, at 924 ("Because the entire civil forfeiture doctrine is made up of legal fictions that if applied in a logically consistent manner provide no internal check on the government's power to employ forfeiture, its application is virtually unbounded."). See also *infra* Part I.C.

21. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."). See also *infra* notes 53-54 and accompanying text.

What I preliminarily suggest in Part I is that the isolation of a *separate* successive punishments' bar is not only mythic, but also quite detrimental because its effect is to undermine the Double Jeopardy Clause's underlying principle of finality and condone governmental overreaching. Further, I suggest that deference to the legislature in the situation where multiple punishments issue in a single proceeding is similarly mythic and noxious. In essence, such deference constitutes an unwarranted legislative exemption from the constraints of a clause which was specifically designed to curb governmental oppression.

Part I also summarizes the evolution of civil in rem forfeiture into powerful law enforcement weaponry. Here I describe forfeiture as not just punishment, but punishment meted out in an arena in which rules and procedures effectually conspire to cripple the accused and empower the already seemingly omnipotent government. It is also here that I stress the antinomy that although such civil forfeiture proceedings can present and even magnify the very ills that the Double Jeopardy Clause was designed to check, courts have created several forfeiture myths to ward off such a critical constitutional protection. Basically, as I suggest, courts, relying on the "civil" and "remedial" labels affixed to such forfeiture and on the personification myth of the guilty property, have deemed the Double Jeopardy Clause to be inapplicable.

Part II focuses on the United States Supreme Court decisions in *United States v. Halper*<sup>22</sup>, *Austin v. United States*<sup>23</sup> and *Department of Revenue of Montana v. Kurth Ranch*<sup>24</sup> and shows how these cases at least temporarily brought about the demise of the longstanding forfeiture myths upon which courts have relied to deprive such civil claimants of double jeopardy protection. In this part, I also point out that the *Kurth Ranch* Court had at least implicitly begun to dispel one of the hoary myths about the Double Jeopardy Clause itself—that is, the interpretation of that Clause as having a *separate* successive punishments' prohibition.

Part III moves into certain federal appellate court decisions in the wake of *Halper*, *Austin* and *Kurth Ranch*. What is perplexing about these decisions is that although the Supreme Court had cleared the way for a realistic understanding of civil in rem forfeiture, several federal appellate courts nevertheless resisted such precedent and progress and strained to create re-

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22. 490 U.S. 435 (1989).

23. 509 U.S. 602 (1993).

24. 511 U.S. 767 (1994).

placement myths to serve as new grounds for rejecting double jeopardy challenges to successive related criminal and civil proceedings.

Specifically in Part III, I discuss how the Second,<sup>25</sup> Sixth<sup>26</sup> and Eleventh Circuits<sup>27</sup> concocted a fictive view of the separate civil and criminal proceedings as comprising or conceivably comprising a "single, coordinated prosecution," which thus does not trigger double jeopardy protection.<sup>28</sup> The Fifth Circuit, on the other hand, spun the just as flimsy theory that *all* civil forfeiture is not punitive and as such, does not always implicate the Double Jeopardy Clause.<sup>29</sup> In connection with this discussion, I show how both the non-separation and non-punitive myths contravened Supreme Court precedent and also, in effect, thwarted the salutary policies behind the double jeopardy bar.

Part IV analyzes the Ninth Circuit decision<sup>30</sup> and dicta in a Seventh Circuit case,<sup>31</sup> which come closest to embracing a mythless approach to civil in rem forfeiture. That is, both courts apparently concluded that all forfeiture is punitive and that the parallel civil and criminal proceedings are always separate. Significantly, what the Ninth and Seventh Circuits shared is an understanding that the effect of the Supreme Court's *Halper*, *Austin* and *Kurth Ranch* trilogy was to mandate the inclusion of forfeiture in the criminal indictment itself if the government wishes to pursue both a criminal sentence and a forfeiture penalty based on the same offense.

It is here in Part IV that I suggest that these courts, through ratification of what I call a mandatory joinder rule,<sup>32</sup>

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25. *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). *Accord* *United States v. Smith*, 75 F.3d 382 (8th Cir. 1996).

26. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996), *rev'd* 116 S. Ct. 2135 (1996).

27. *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994).

28. In *Ursery*, 59 F.3d at 575, the Sixth Circuit concluded that although the parallel criminal and civil cases before it were separate, such consecutive proceedings were not *always* separate. *See also* discussion *infra* Part III.A.2.

29. *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994). *Accord* *Smith v. United States*, 76 F.3d 879 (7th Cir. 1996); *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995).

30. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S. Ct. 762 (1996), *rev'd*, 116 S. Ct. 2135 (1996). *Accord* *United States v. 9844 S. Titan Court*, 75 F.3d 1470 (10th Cir. 1996).

31. *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 669 (1994).

32. *Id.* at 1464 ("The United States would do well to seek imprisonment, fines, and



were the ones that properly abided by the Supreme Court precedent and promoted a procedure which, in effect, most approximates the affording of double jeopardy protection for forfeiture claimants. Also, in this Part, I criticize what were the government's efforts to twist the *Blockburger* analysis<sup>33</sup> into a tool for the circumvention of the dictates of the Double Jeopardy Clause and suggest that acquiescing in such contentions would not only be disingenuous but inconsistent with the reasoning of Supreme Court decisions.

Part V is essentially a critique of the Supreme Court's recent decision in *United States v. Ursery* and *United States v. \$405,089.23 United States Currency*<sup>34</sup> in which the Supreme Court concluded that the Double Jeopardy Clause is inapplicable to civil in rem forfeitures because such proceedings do not impose "punishment" and are not criminal. As I will show, the Court in that decision has not just resurrected, but actually apotheosized the detrimental myths it eradicated in the *Halper*, *Austin* and *Kurth Ranch* cases. In the *Ursery* and *\$405,089 U.S. Currency* decision, however, the Court not only ignored its own precedent but also shattered the sacred core of double jeopardy protection.

In the conclusion, I suggest that perhaps the best approach to the problem is the relatively mythless approach of the Ninth and Seventh Circuits and that that approach did not even go far enough. What I advance is that the Supreme Court in the *Ursery* and *\$405,089 U.S. Currency* cases should have bestowed double jeopardy protection on the forfeiture claimants that endure both forfeiture proceedings and a criminal prosecution. In effect, the Court should have set forth what is effectually a mandatory joinder rule. That is, the Court should have activated the finality principle in the Double Jeopardy Clause by harmo-

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forfeiture in one proceeding."). See also *United States v. \$405,089.23 U.S. Currency*, 33 F.3d at 1222, ("If, in such cases, the government wishes to obtain forfeiture and to impose other forms of criminal punishment, it 'will have to rely to a much greater extent on criminal forfeiture.'") (quoting 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, 12-131 to 12-132 (1993)). Accord *United States v. 9844 S. Titan Court*, 75 F.3d at 1487.

33. In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court set forth a test to determine when a second proceeding is barred by double jeopardy. The Court held that there is no double jeopardy bar when the statutes under which a defendant is tried each require "proof of an additional fact which the other does not." *Id.* at 304. See also *United States v. Dixon*, 509 U.S. 688, 696 (1993) (reaffirming the "same-elements" test of *Blockburger*). See generally discussion *infra* Part IV.C.

34. 116 S. Ct. 2135 (1996), *rev'g* *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) and *United States v. \$405,089.23 United States Currency*, 33 F.3d 1210 (9th Cir. 1994).

nizing the successive-punishments-prohibition with the Clause as a whole. This would have entailed the Court's explicit acknowledgement of what Justice Scalia pointed out in his dissent in *Kurth Ranch*—that “the Double Jeopardy Clause’s ban on successive criminal prosecutions . . . make[s] surplusage of any distinct protection against additional punishment imposed in a *successive prosecution* since the prosecution *itself* would be barred.”<sup>35</sup>

In the conclusion, I also suggest that the *Ursery* and *\$405,089.23 U.S. Currency* cases were a missed opportunity. The Court should have questioned what has traditionally been the special treatment of multiple punishments that are imposed in a single proceeding. In so doing, the Court should have recognized that real constitutional protection involves the abrogation of that special legislative deference in the situation in which multiple punishments issue in a single proceeding. At the end of the article, I revisit Prometheus, the emblem of redundant pain, and flesh out the conceit by equating mythless concepts of civil forfeiture and double jeopardy protection with a Prometheus “unbound.”<sup>36</sup>

## I. MYTHIC FORFEITURE AND DOUBLE JEOPARDY

### A. *Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment, which guarantees that no person “shall . . . be subject for the same offence to be twice put in jeopardy of life or limb,”<sup>37</sup> has venerable origins. While some legal historians trace the double jeopardy prohibition to Greek and Roman times,<sup>38</sup> it was surely

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35. *Kurth Ranch*, 511 U.S. at 801 (Scalia, J., dissenting).

36. See *infra* note 788.

37. U.S. CONST. amend. V. Double jeopardy protection applies not only to “life or limb,” but also to prison sentences and criminal fines. *Jeffers v. United States*, 432 U.S. 137, 155 (1977). The Due Process Clause of the Fourteenth Amendment extends double jeopardy protections to state prosecutions. *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

38. See JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 2-4 (1969) (“The principle found final expression in the *Digest of Justinian* as the precept that ‘the governor should not permit the same person to be again accused of a crime of which he had been acquitted.’ Criminal procedure was quite unlike modern state-directed prosecutions, since, according to the Roman jurist Paulus, ‘after a public acquittal a defendant could again be prosecuted by his informer within thirty days, but after that time this cannot be done.’”). See also Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L. REV. 735, 747-48 (1983); Bernard J. Gilday, Jr. & Stephen E. Gillen, *Jeopardy—Meandering Through Mandates and Maneuvers*, 6 N. KY. L. REV. 245, 245-46 (1979); Peter J. Hen-

well entrenched in the English common law.<sup>39</sup> In the Seventeenth Century, Lord Coke defined double jeopardy as the combination of three related common law pleas: *autrefois acquit*, *autrefois convict* and pardon.<sup>40</sup> Later, Sir William Blackstone said that it was the "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence."<sup>41</sup>

Despite its prominence in the English common law, the original thirteen colonies did not hasten to constitutionalize double jeopardy protection.<sup>42</sup> At the time of the First Congress, only New Hampshire had a double jeopardy prohibition in its constitution.<sup>43</sup> In the course of the ratification proceedings, how-

ning, *Precedents In A Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 7 (1993); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 827-28 (1988); Comment, *Constitutional Law—Double Jeopardy—A Historical Perspective—Successive Conviction For A Crime By Two Sovereignities* 5 N.Y.L.F. 393, 393 (1959).

39. See MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 5-15 (1969) (discussing history of double jeopardy in English Law). According to Friedland, it was:

[t]he controversy between Henry II and Archbishop Thomas A. Becket—and Henry's concession in 1176 following Becket's murder—that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King's courts probably was primarily responsible for bringing about the adoption of the concept of double jeopardy in the common law.

*Id.* at 5. See also SIGLER, *supra* note 38, at 1-16.

40. See Gilday & Gillen, *supra* note 38, at 246 (According to Lord Coke, double jeopardy protection consisted of a combination of "three related common law pleas: (1) *autrefois acquit* (prior acquittal); (2) *autrefois convict* (prior conviction); and (3) pardon." (citation omitted)). But see Cantrell, *supra* note 38, at 754 n.92 ("The 'fundamental' concept of modern double jeopardy embraces four distinct common law pleas in bar, the pleas of *autrefois acquit*, *autrefois convict*, *autrefois attain* and pardon. . . . The plea of *autrefois attain* . . . was used whenever a defendant had been previously found guilty of a felony and sentenced to death. The convicted defendant was thus referred to as having been 'attainted' of a felony by judgment of death."). For a discussion of *autrefois acquit* and *autrefois convict*, see FRIEDLAND, *supra* note 39, at 94-95.

41. 4 WILLIAM BLACKSTONE, *COMMENTARIES* 335-36. See generally SIGLER, *supra* note 38, at 20 (writing one hundred years after Coke, Blackstone describes former jeopardy as applying to state prosecutions alone). But see Cantrell, *supra* note 38, at 759 (arguing that ". . . Blackstone made no significant contribution to the law of double jeopardy" and that Sir William Hawkins' *Treatise on the Pleas of the Crown* in 1724 "appears to be a more thorough and extensive commentary").

42. See generally SIGLER, *supra* note 38, at 21-34 (discussing the evolution of American double jeopardy). See also Cantrell, *supra* note 38, at 766 (discussing historians' confusion over "the exclusion of double jeopardy protection from most of the revolutionary constitutions."); Gilday & Gillen, *supra* note 38, at 246 (discussing how "[t]he common law double jeopardy protection was not broadly constitutionalized by the original thirteen colonies.").

43. N.H. CONST. 1784, pt. I, art. XVI. See SIGLER, *supra* note 38, at 23 (the New Hampshire Constitution of 1784 stated, "No subject shall be liable to be tried, after an

ever, Maryland and New York endorsed a double jeopardy addition to the federal Constitution.<sup>44</sup>

In response, in 1789 James Madison proposed a clause stating that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence."<sup>45</sup> At least one commentator has attributed the selection of Blackstone's language over Madison's version to a desire to clarify that the Double Jeopardy Clause, by forbidding a second trial regardless of the outcome of the first, protects an individual's right to finality.<sup>46</sup> Significantly, such a theory makes sense because double jeopardy protection is not concerned with just the imposition of successive punishments, but actually with the subjection of individuals to multiple punitive ordeals.<sup>47</sup>

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acquittal, for the same crime or offence."). See also discussion in Cantrell, *supra* note 38, at 766; Gilday & Gillen, *supra* note 38, at 246.

44. Gilday & Gillen, *supra* note 38, at 246 n.7 (quoting 1 & 2 JONATHAN ELLIOTT, THE DEBATES IN SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328, 550 (1876)), state:

The Clause suggested by New York read as follows: 'That no person ought to be put twice in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence.' . . . The Maryland suggestion read: 'That there shall be . . . no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.'

See generally SIGLER, *supra* note 38, at 27-34 (discussing the Fifth Amendment and Double Jeopardy).

45. Gilday & Gillen, *supra* note 38, at 246 n.8 (quoting 1 ANNALS OF CONG. 434 (Gales & Seaton eds., 1789)). See also SIGLER, *supra* note 38, at 28-33.

46. See Cantrell, *supra* note 38, at 770 (acknowledging that although "[t]he true intent of the framers may indeed be an exercise in speculation[,] the founders probably intended 'to erect a 'humane' or humanitarian shield against multiple punishments and prosecutions.'"). But see SIGLER, *supra* note 38, at 30-32 (according to the only recorded debate on the Double Jeopardy Clause, there was a concern that Madison's original terminology might be construed to defeat the right of a defendant to set aside an erroneous conviction and demand a new trial). See also Linda S. Eads, *Separating Crime From Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 933-34 (1990) ("Little historical data exists on the reasons for these changes other than the objection that, as drafted, the clause could be construed to bar a convicted defendant from appealing."); Henning, *supra* note 38, at 7.

47. See Justice Scalia's dissent in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 801 (1994) (arguing that . . . "the 'no-double-punishments' rule . . . [is not] . . . a free standing constitutional prohibition implicit in the Double Jeopardy Clause . . . [but] merely an aspect of the Due Process Clause requirement of legislative authorization."). See also FRIEDLAND, *supra* note 39, at 3-4 ("The main rationale of the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions."). Scholars have emphasized that the finality interest is the real core of double jeopardy protection. See, e.g., Eads, *supra* note 46, at 953 (discussing how "an accused's interest in finality" is "a basic justification for double jeopardy protection."); Henning, *supra* note 38, at 7 ("[w]here the defendant has been tried before,

One thing that the Double Jeopardy Clause forbids is a second prosecution for the same offense after acquittal.<sup>48</sup> As one commentator has elaborated, one underlying reason for this particular bar is that "guilt should be established by proving the elements of a crime to the satisfaction of a single jury not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries."<sup>49</sup> Double jeopardy also prohibits a second prosecution for the same offense after conviction.<sup>50</sup> In so doing, it prevents the prosecutor from shopping for the biggest sentence through consecutive prosecutions before different judges.<sup>51</sup>

In addition, courts have applied double jeopardy protection to situations in which multiple punishments are imposed for the same offense.<sup>52</sup> In so doing, courts tend to view the multiple punishment component as having two distinct attributes. That is, the imposition of multiple punishments in a single proceeding is permissible as long as "the legislature actually authorized the cumulative punishment."<sup>53</sup> Basically, courts rationalize such deference to the legislature as ensuing from the notion that Congress is the branch with the power to define crimes and punishments.<sup>54</sup>

In contrast, multiple punishments in successive proceedings are plain taboo.<sup>55</sup> This is not based just on the belief that multi-

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the primary value is protecting the defendant's interest in the finality of the verdict."); Thomas, *supra* note 38, at 839 (arguing that verdict finality is the only value behind double jeopardy protection). See also Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences* 78 MICH. L. REV. 1001, 1033 & 1063 (1980) (arguing that although the finality interest is "essentially more indigenous to the double jeopardy clause than its . . . companion values . . ." it can be overridden by other contrary societal interests). But see Cantrell, *supra* note 38 (arguing that the Double Jeopardy Clause significantly serves as a shield against multiple punishments).

48. See *United States v. Halper*, 490 U.S. 435, 440 (1989).

49. Notes & Comments, *Twice In Jeopardy*, 75 YALE L.J. 263, 267 (1965).

50. See *Halper*, 490 U.S. at 440.

51. See Notes & Comments, *supra* note 49, at 267.

52. See *Halper*, 490 U.S. at 440. In his dissent in *Kurth Ranch*, 511 U.S. at 799-800, Justice Scalia traces the belief that there is a multiple-punishments component of the Double Jeopardy Clause to *Ex parte Lange*, 85 U.S. (18 Wall) 163 (1874). See also Cantrell, *supra* note 38, at 736-39.

53. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.").

54. *Id.* See also *Halper*, 490 U.S. at 450-51. See generally Henning, *supra* note 38, at 8 ("[T]he Double Jeopardy Clause does not directly limit the legislature's discretion to define an act as criminal or to set the sanction to be applied upon a finding of guilt.").

55. See *Halper*, 490 U.S. at 451 n.10 ("That the Government seeks the civil penalty

ple successive punishments pose a risk that the cumulative penalty will exceed what the legislature has authorized, but also on a fear that dissatisfaction with the first sanction will prompt the government to seek a second.<sup>56</sup>

The view of the Double Jeopardy Clause as having such a *separate* successive punishments component has the potential to undermine the bedrock policies behind the Clause. First, the Double Jeopardy Clause administers to the accused's interest in finality. In fact, the Supreme Court has elaborated on this facet:

[An idea] that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>57</sup>

As the Supreme Court and legal scholars have suggested, the finality principle in a criminal case has its analogues in *res judicata* and other civil law doctrines of finality.<sup>58</sup> In this respect, the double jeopardy protection, like its civil kindred, stands for the somewhat unremarkable proposition that at a certain point the disruptive ordeal is over.

Second, the double jeopardy finality rule encompasses what the Supreme Court has suggested—that the deterrence of serial trials curtails governmental harassment.<sup>59</sup> As the Court has put it, the Clause is cognizant of what “every person acquainted

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in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause.”); *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1490 (10th Cir. 1996) (“[W]e must conclude that congressional intent, no matter how clear, cannot bestow constitutional legitimacy upon multiple punishments for the same offense when they are imposed in multiple proceedings.”).

56. *Halper*, 490 U.S. at 451 n.10 (“[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.”).

57. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

58. See generally FRIEDLAND, *supra* note 39, at 89 (discussing how “[r]es judicata in criminal matters comprises not one, but a number of overlapping concepts”); Notes & Comments, *supra* note 49, at 277 (suggesting that *res judicata* is the civil law analogue to double jeopardy). Cf. *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916) (Justice Holmes arguing that criminal defendants should have the same protection as civil litigants because “the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.”).

59. See *Green*, 355 U.S. at 187-88. See generally Notes & Comments, *supra* note 49, at 286-92.

with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration."<sup>60</sup> As such, inhering in the Clause is the premise that punishment can issue, not just literally in the sentence, but in the form of the prosecutorial ordeal itself. Because criminal prosecutions are unto themselves punitive in their inevitable shattering of the lives of the accused, the Clause aims to effectuate a balance between society's need to prosecute those who break the law and the accused's right to have an end to that disruption.<sup>61</sup>

Significantly, the individual's right to finality and the protection from undue governmental oppression are not unfastened from our Constitution as a whole. As one scholar has put it:

[D]ouble jeopardy is not simply *res judicata* dressed in prison grey. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law—our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution.<sup>62</sup>

Essentially the double jeopardy policies ensue from what I have before described as the "gnomic awareness that underlies the overall structure and specific provisions of the United States Constitution", which is "the equation of unchecked power with corruption . . . ."<sup>63</sup> Specifically, two commentators have aptly portrayed this as Constitutional Framers that were "virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power."<sup>64</sup>

While the double jeopardy protection springs from that constitutionally ubiquitous fear of governmental tyranny,<sup>65</sup> its spe-

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60. *Ex parte Lange*, 85 U.S. (18 Wall) 163, 171 (1874) (quoting *Commonwealth v. Olds*, 5 Ky. (1 Litt.) 137, 139 (1827)).

61. See Henning, *supra* note 38, at 8.

62. Notes & Comments, *supra* note 49, at 277-78.

63. Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes On Judicial Power After Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1037 (1993).

64. Martin H. Redish & Elizabeth J. Cisar, "If Angels were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 451 (1991).

65. See Cantrell, *supra* note 38, at 764-66 (discussing the American break with English history and tradition as deriving in part from the mistrust of centralized governmental power); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325-26 (1986) ("In the

cific focus, however, has been on the potentially oppressive prosecutor.<sup>66</sup> Without the Clause's finality mandate, prosecutors could drag the accused through a perceived eternity of trials until they find a jury willing to convict. Without the Clause's effectual ban on harassment, prosecutors could put the accused through a seemingly endless litany of prosecutions until they land a sentencer with the most satisfying sentence. Absent the Clause's restrictions, prosecutors could augment the pain of the punitive ordeal through relentless redundancy.

One problem is that if there is a *separate* successive punishments' component to the Double Jeopardy Clause, there is then a sanctioned prosecutorial opportunity to thwart finality and thus, badger the accused.<sup>67</sup> That is, if the prohibition of successive prosecutions does not subsume the successive punishments bar, then the government can theoretically subject an acquitted criminal defendant to a second ordeal that results in the first punishment. In fact, having a successive punishments component as something *distinct* makes no real sense because its very existence impliedly condones precisely what the Clause interdicts—namely, oppressive multiple ordeals.

It is similarly problematic that although the Double Jeopardy Clause stems from that same preoccupation with governmental tyranny that pervades the whole Constitution, courts traditionally interpret the multiple punishments aspect of the Clause as housing a legislative sanctuary. Despite the fact that Congress is indeed part of the government and has even been denominated "the most dangerous branch" of government<sup>68</sup> and the judiciary is the one more frequently likened to the rightful

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United States, virtually everyone agrees that [the double jeopardy] prohibition is an essential part of an individual's protection against governmental tyranny.").

66. See generally SIGLER, *supra* note 38, at 155-87 ("The policy issue: the power of the prosecutor"); Henning, *supra* note 38, at 8; Cantrell, *supra* note 38; Cf. Whalen v. United States, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring) ("The only function the Double Jeopardy Clause serves in cases challenging multiple punishments [in the first proceeding] is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.").

67. See Eads, *supra* note 46, at 953 (criticizing *Halper* for distinguishing a "multiple punishment prong" from the rest of the Clause because it ignores the "accused's interest in finality"); See also discussion *infra* Part IIA.2.

68. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1156 (1992). See also THE FEDERALIST No. 48, at 340 (James Madison) (Tudor Publishing Co. 1937) ("[I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.").



guardian of individual liberties,<sup>69</sup> the double jeopardy paranoia perplexingly tends to eschew Congress and fix almost myopically on the judiciary.<sup>70</sup>

The Double Jeopardy Clause's legislative apotheosis manifests itself primarily in the multiple punishment area. With respect to multiple punishments imposed in a single proceeding, the Clause defers to Congressional power to define a criminal act and set the punishment.<sup>71</sup> As such, the Double Jeopardy Clause has spawned at least two of its own myths: the first is that of an existing separate successive punishments bar. The second is the notion that the legislature is somehow worthy of a pardon from the limitations that the Constitution imposes on a government endowed with a tropistic tendency to lean toward tyranny.

### B. *Civil In Rem Forfeiture*

The concept of asset forfeiture also has venerable origins, ones which legal historians have dated back to the belief of the ancient Greeks that objects were guilty of the acts committed with them.<sup>72</sup> The civilization of the Second Century, B.C., convicted both animals and inanimate objects of wrongful acts in the Prytaneum.<sup>73</sup> As Oliver Wendell Holmes described it, if an inanimate object caused the death of a human being, "it was to be cast beyond the borders," or basically, sent into a specie of

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69. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 69-77 (C.B. Macpherson, ed., 1980) (describing the individual turning to the judiciary for help when the government becomes oppressive); BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 630 (1945); Cf. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 67 (1980) ("The Supreme Court has been and should be the ultimate guardian of individual liberty"); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 119 (1973) (arguing that the Framers and Ratifiers "feared Congress and trusted judges.").

70. The Supreme Court has stated:

[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

*Brown v. Ohio*, 432 U.S. 161, 165 (1977). See also *supra* note 66.

71. See *supra* notes 53-54, 65 and accompanying text.

72. See, e.g., OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7-15 (1945); 1 THE CIVIL LAW 69 (Samuel P. Scott trans., 1932) (discussing forfeiture in Roman law: "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury."); Wood, *supra* note 9, at 1359.

73. HOLMES, *supra* note 72, at 8.

exile.<sup>74</sup> That fiction of the guilty object also surfaces in Judeo-Christian history: in *Exodus*, Moses delivered the personifying message that "[w]hen an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten."<sup>75</sup>

The English common law adopted the guilty property fiction in the form of deodand.<sup>76</sup> Under deodand law, the value of the object that caused the death of the king's subject was forfeited to the crown. The king would then provide the money for a mass for the soul of the dead person or ensure that the deodand went to charity.

Eventually the religious or eleemosynary purposes disappeared and the deodand became a source of crown revenue.<sup>77</sup> At that juncture, the deodand institution was understood more as a way of penalizing human carelessness.<sup>78</sup> That is, the myth that the property was the wrongdoer somewhat subordinated itself to the notion that such forfeiture served to punish the property's wrongdoing owner.

In England, deodand coexisted with two other forms of forfeiture: forfeiture of property upon conviction for a felony or treason and statutory forfeiture.<sup>79</sup> Both of these were essentially punitive. The forfeiture of the property of felons and traitors rested on the concept of property ownership as being a "right derived from society" and on the belief that one who breaks society's laws should lose the ownership right.<sup>80</sup> As such, the convicted felons' land escheated to their lord while their personal property was forfeited to the crown.<sup>81</sup> Similarly, convicted trai-

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74. *Id.* Holmes explained:

An untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation. The hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized men to kick a door when it pinches his finger, is embodied in the *noxae deditio* and other kindred doctrines of early Roman Law.

*Id.* at 11-12.

75. *Exodus* 21:28 (Revised Standard Version).

76. Deodand derives from the Latin *deo dandum*, which means "a thing to be given to God." BLACK'S LAW DICTIONARY 436 (6th ed. 1990). See generally HOLMES, *supra* note 72, at 24-25; Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973); Hauert, *supra* note 9, at 162-66; Munn, *supra* note 9, at 1260-61; Piety, *supra* note 18, at 928-35; Austin v. United States, 509 U.S. 602, 611 (1993).

77. *Austin*, 509 U.S. at 611. See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

78. *Austin*, 509 U.S. at 611.

79. *Id.* at 611-12.

80. *Id.* at 612.

81. *Id.* See also *Calero-Toledo*, 416 U.S. at 682 ("The basis for these forfeitures was that a breach of the criminal law was an offense to the King's Peace, which was felt to

tors lost all real and personal property, but it went solely to the crown.<sup>82</sup>

Blackstone, in fact, described statutory forfeiture as "penal."<sup>83</sup> While such "forfeitures of offending objects used in violation of the customs and revenue laws,"<sup>84</sup> did rest on the guilty property fiction, it veritably targeted a culpable owner, who was being punished for direct or vicarious wrongdoing.<sup>85</sup> As an example, a violation of the Navigation Acts of 1660, which basically mandated the shipping of most goods in English vessels, resulted in forfeiture of the ship and the goods.<sup>86</sup> Even where the violation was due to some mariner's act of which the ship owner was unaware, the result was the same.<sup>87</sup> Essentially, the theory was that the owner should be blamed for entrusting the property to the wrongdoer or that the unlawful act should simply be imputed to the owner.<sup>88</sup>

Neither deodand nor forfeiture of estate made its way to the new world.<sup>89</sup> Before the adoption of the Constitution, the colonies used in rem forfeiture proceedings to seize objects under the English and local forfeiture statutes.<sup>90</sup> After the adoption of the Constitution, new enactments authorized in rem jurisdiction over ships and cargos involved in customs offenses.<sup>91</sup> As the United States Supreme Court has somewhat recently acknowledged, an "examination of those laws suggests that the First Congress viewed [such] forfeiture as punishment."<sup>92</sup>

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justify denial of the right to own property.").

82. *Austin*, 509 U.S. at 612. See also *Calero-Toledo*, 416 U.S. at 682.

83. *Austin*, 509 U.S. at 612 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*261).

84. *Calero-Toledo*, 416 U.S. at 682.

85. *Austin*, 509 U.S. at 612.

86. *Id.*

87. *Id.*

88. *Id.* at 612-13.

89. *Calero-Toledo*, 416 U.S. at 682-83.

90. *Id.* at 683.

91. *Austin*, 509 U.S. at 613. See also *Calero-Toledo*, 416 U.S. at 683; Franze, *supra* note 9, at 375 ("These initial federal civil forfeiture statutes served vital national interests during the early days of our Republic. In times of war, vessel forfeitures were used to destroy the maritime strength of our enemies. Such provisions were also utilized during the Revolutionary War to seize Tory property and later to seize Confederate property during the Civil War."); Hauert, *supra* note 9, at 167-70 (discussing the adoption and development of forfeiture in the United States before and after the Civil War).

92. *Austin*, 509 U.S. at 613. Munn, *supra* note 9, at 1261-62 explains, however, that until the Civil War, the guilty property fiction was the basis behind statutory civil forfeiture. An Act that Congress passed in 1862, which provided for confiscation of property of persons involved in the rebellion, was directed not at the property—but the property owner. *Id.* According to Munn, after the Civil War, "statutory civil forfeiture again became intertwined with the guilty property fiction." *Id.* at 1262.

Most legal historians and scholars agree that forfeiture can be an extremely harsh and powerful weapon.<sup>93</sup> In the early 1970's, Congress, wishing to extend forfeiture beyond its typical use in customs violations and admiralty law, employed it to combat the spread of drug use and distribution.<sup>94</sup> When Congress enacted the civil drug-related forfeiture statute, 21 U.S.C. § 881, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, it authorized the forfeiture of contraband or any property used in drug trafficking.<sup>95</sup> In 1978, Congress amended the forfeiture provisions to include proceeds traceable to drug transactions, which included money and negotiable instruments.<sup>96</sup> The Senate Report on that particular amendment described the forfeiture statute as "penal in nature."<sup>97</sup> In 1984, Congress again amended the Act, this time to include real property.<sup>98</sup> In so doing, Congress confirmed that its intent was to use such provisions as a "powerful deterrent" to the commission of drug offenses.<sup>99</sup>

Section 881's capacity to reach such a broad spectrum of property is not the only thing that empowers it. The rules and procedures attendant to § 881 forfeiture, which have the effect of disadvantaging claimants, serve to fortify the device in such a way that makes it downright oppressive. Basically, § 881 permits the government to obtain an arrest warrant by filing a verified complaint with the clerk of the court.<sup>100</sup> There is thus no

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93. See *supra* notes 9-19 and accompanying text.

94. See 1 STEVEN L. KESSLER, *CIVIL AND CRIMINAL FORFEITURE* § 1.01 (1994) (discussing Congress' efforts to combat crime through using forfeiture as an attractive alternative to prison). The sponsor of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970), Senator Dodd of Connecticut, described it as "strictly and entirely a law enforcement measure . . . designed to crack down hard on the narcotics pusher and the illegal diverters of pep pills and goof balls." 116 CONG. REC. 977-78 (1970).

95. See Robin M. Sackett, *The Impact of Austin v. United States: Extending Constitutional Protections to Claimants In Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495, 501 (1994); Wood, *supra* note 9, at 1361.

96. Sackett, *supra* note 95, at 501-02.

97. *Id.* See also *Austin*, 509 U.S. at 620 (quoting the Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 CONG. REC. 34671 (1978)).

98. Sackett, *supra* note 95, at 502.

99. *Id.*

100. Carpenter, *supra* note 9, at 1121. Because an early source of our forfeiture law was admiralty law, many forfeiture statutes include admiralty and customs law procedures. See Franze, *supra* note 9, at 383. Until somewhat recently, real or personal property could be seized without a warrant. See 21 U.S.C. § 881(b) (1994). In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court held that the Due Process Clause requires the government to afford notice and a meaningful opportu-

requirement of a judicial probable cause determination and instead that initial decision is left in the hands of law enforcers or prosecutors.<sup>101</sup> Once the marshall serves the warrant, the property is seized and all the government really has to do is give public notice of the forfeiture proceedings.<sup>102</sup>

Further, the statute itself permits warrantless seizures under certain circumstances.<sup>103</sup> Although the Justice Department has implemented a policy forbidding such seizures "until a neutral and detached magistrate has made an independent finding of probable cause and issued a federal seizure warrant," the Department excepts property that might be "removed, hidden, or destroyed before a warrant can be obtained."<sup>104</sup> Such an exception, which can conceivably include almost any property that is not securely fixed to terra firma, can expansively swallow that self-imposed warrant requirement.<sup>105</sup>

After the seizure itself, § 881 gives the government three ways of obtaining the forfeiture. The first, summary forfeiture, is the avenue for confiscating controlled substances and materials used to manufacture drugs.<sup>106</sup> Because such items are deemed to pose a public danger, such forfeiture can proceed without notice and without a hearing.<sup>107</sup>

The second, administrative forfeiture, applies to property valued at \$500,000 or less.<sup>108</sup> It also applies to conveyances used to transport or store illegal drugs, regardless of the value, as long as the prosecutor has probable cause to believe that the property is forfeitable.<sup>109</sup> This administrative process does impose notice requirements on the agency that actually seizes the

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nity to be heard before real property can be seized.

101. Carpenter, *supra* note 9, at 1121.

102. *Id.*

103. Warrantless seizures are permitted if the seizure of the property is incidental to the arrest of a person, if the property has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding, if there is probable cause to believe that the property is a threat to public safety, or if there is probable cause to believe that the property was used to facilitate a drug crime. 21 U.S.C. § 881(b) (1994).

104. EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF JUSTICE ASSET FORFEITURE PROGRAM 1992, at 3 (1993).

105. Carpenter, *supra* note 9, at 1121 ("The Justice Department's self-imposed warrant requirement for seizures reflects an effort to comply with the Fourth Amendment, but the exception for property that is in danger of disappearing swallows the rule.").

106. 21 U.S.C. § 881(f) (1994).

107. *See id.*

108. *Id.* § 881(d); Tariff Act of 1930, 19 U.S.C. §§ 1607, 1610 (1994).

109. 19 U.S.C. §§ 1607, 1610. *See also* § 1615.

property.<sup>110</sup> But if an individual fails to respond to the notification within the allotted time frame, the property is automatically forfeited.<sup>111</sup>

In the third procedure, that of judicial forfeiture, the government must give notice, informing anyone with an interest in the property of the action.<sup>112</sup> In this judicial proceeding, the government really has an edge. All it must initially do is establish probable cause to believe that the seized property is subject to forfeiture.<sup>113</sup> The government, in fact, can meet this threshold by showing a mere reasonable ground for belief of guilt, and this may be supported by less than *prima facie* proof.<sup>114</sup> While the government can rely on circumstantial and hearsay evidence to demonstrate probable cause, the claimant, however, cannot use the same sort of evidence in rebuttal.<sup>115</sup>

Once the government establishes mere probable cause, a peculiar atrocity occurs—that is, the burden shifts to the property owner. The onus is thus on the owner to prove by a preponderance of the evidence that the property is not subject to forfeiture or that he or she has an affirmative defense.<sup>116</sup> In this proceeding, the owner who often lacks funds or has no access to such funds, has no right to a public attorney.<sup>117</sup> Also, because such a

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110. 19 U.S.C. §§ 1602, 1607, 1608.

111. 19 U.S.C. § 1608. If the property owners wish to have a judicial forfeiture, they may transfer the matter to the United States Attorney's Office by filing a claim and posting a bond. *Id.*

112. 19 U.S.C. § 1607. See also David B. Smith, *The Civil Forfeiture Case's Critical Beginning*, 35 PRAC. LAW. 57 (1989).

113. 19 U.S.C. § 1615. See generally discussion in Ator, *supra* note 9; Caffarelli, *supra* note 9, at 1452-53; Carpenter, *supra* note 9, at 1122; Franze, *supra* note 9, at 383-85; David Lieber, *Eighth Amendment—The Excessive Fines Clause*, 84 J. CRIM. L. & CRIMINOLOGY 805, 805-06 (1994); Reinhart, *supra* note 9, at 247-48; Taifa, *supra* note 9, at 98-99.

114. See sources cited *supra* note 113.

115. See generally Caffarelli, *supra* note 9, at 1453 ("In addition to the lower burden of proof, civil forfeiture provides the government with many tactical advantages otherwise unavailable in a criminal proceeding. For example, the government may use hearsay evidence and a wider range of civil discovery procedures in a civil forfeiture hearing."); Carpenter, *supra* note 9, at 1122 ("The claimant, however, must proffer evidence admissible under the rules of evidence. The government can meet its burden of production with hearsay, for the probable cause standard in forfeiture proceedings is the standard used to test search warrants."). See also Franze, *supra* note 9, at 384.

116. See sources cited *supra* note 113.

117. See *Austin v. United States*, 509 U.S. 602, 607 (1993). Cf. *United States v. Parcel 2 at Highway 13/5*, 747 F. Supp. 641, 648 (N.D. Ala. 1990) (citing *United States v. Noriega*, 746 F. Supp. 1541 (S.D. Fla. 1990)) ("In *Noriega*, the learned trial judge found that the use of the forfeiture statute had not only deprived defendant, as a practical matter, of the opportunity to contest the government's pretrial restraint of his assets but had also deprived him of assets needed to retain the counsel guaranteed him by the

forfeiture action is in rem and can proceed even if the property owner is dead or out of reach, there is frequently a default forfeiture.<sup>118</sup>

Until *Halper, Austin and Kurth Ranch*, the government could freely choose to pursue forfeiture before, during or after the criminal prosecution.<sup>119</sup> The post-conviction civil forfeiture,

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Sixth Amendment.”), *rev'd*, 946 F.2d 749 (11th Cir. 1991). See also Cheh, *supra* note 9, at 2 (“The owner shoulders the burden of proving the property’s ‘innocence.’ To make this showing, the owner not only must pay the costs and expenses associated with a legal proceeding, he usually must do without his property in the meantime even as the government dallies.”) (footnotes omitted); Piety, *supra* note 18, at 921-23 (“[T]he doctrine of civil forfeiture has turned into a legal juggernaut, crushing every due process claim thrown in its path: the privilege against self-incrimination, the prohibition against cruel and unusual punishment, the right to trial by jury, the right to a verdict rendered only after a finding of guilt beyond a reasonable doubt, the right to be free from being twice charged with the same offense, the right to be free from government seizures of property absent probable cause, and the right to counsel of choice.”) (footnotes omitted); Wood, *supra* note 9, at 1376 (“[I]f the government seeks forfeiture of a large amount of the defendant’s assets under the theory of facilitation or proceeds, it is entirely possible that the defendant will not be able to afford to hire an attorney. Moreover, since it is a civil case, he cannot receive appointed counsel.”).

118. See, e.g., *In re One 1985 Nissan, 300ZX*, 889 F.2d 1317, 1319 (4th Cir. 1989) (civil forfeiture does not terminate upon death of property owner). See also Pollock, *supra* note 18, at 469 (“[B]ecause the proceeding is in rem, punishment can be achieved even if the wrongdoer is a fugitive.”); Wood, *supra* note 9, at 1373 (In a judicial proceeding, “the owner must intervene by filing a claim and paying a bond equal to ten percent of the amount of the property. The owner must file this claim within twenty days of the government’s notice of commencement of forfeiture action. If she does not, the property is forfeited by default.”); Cheh, *supra* note 9, at 3 describes the pressures on a property owner facing civil forfeiture:

The resolute and well-heeled owner can persist but, if he is somehow involved in wrongdoing, he also risks losing his privilege against self-incrimination. Any testimony in defense of the property can be used against him in a later criminal trial. Moreover, he faces pressure—and the greater the value of the property, the greater the pressure—to sacrifice the property in return for a “deal” with prosecutors to avoid criminal charges.

(footnotes omitted).

119. Subsection (i) of § 881 allows only the government to seek a stay of civil forfeiture proceedings pending related criminal proceedings. See generally Chatman, *supra* note 9, at 746 (“[C]ivil forfeiture proceedings may precede or follow a criminal conviction; the mere fact that the government chooses to initiate a civil action does not mean that the property owner does not face criminal charges in conjunction with the activity provoking the civil forfeiture action.”) (footnote omitted); Franze, *supra* note 9, at 382 and n.71 (“In fact, the property owned by a person acquitted of a criminal narcotics offense may still be subject to civil forfeiture . . . . As stated in one of the earliest forfeiture cases: ‘[T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.’” (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827))); Steven H. McClain, *Running the Guantlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) & (7)*, 70 NOTRE DAME L. REV. 941, 942-43 (1995) (“Civil

of course, bestowed some considerable advantages on the government. Basically, the government could use the criminal conviction to simplify its effort to obtain a summary judgment in its favor in the civil suit.<sup>120</sup>

In addition, one of the relatively few defenses for claimants under § 881 is that of the innocent owner.<sup>121</sup> Theoretically this defense gives claimants a way to defeat forfeiture by establishing that the illegal activity was committed "without [their] knowledge or consent."<sup>122</sup> While the innocent owner defense's utility is questionable at best, where such an owner has already been criminally convicted of the offense involved in the forfeiture, the proof of criminal mens rea effectually obliterates an innocence assertion in a subsequent civil proceeding.<sup>123</sup>

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forfeiture can be pursued before, during or after criminal prosecution."); Wood, *supra* note 9, at 1376 ("[T]he civil nature of the proceeding means that the forfeiture action can be brought even if the defendant has been acquitted of criminal charges, thus giving the government a second turn at bat.").

120. McClain, *supra* note 119, at 943. See also Carpenter, *supra* note 9, at 1125 (pointing out that when the government obtains a stay of civil forfeiture proceedings pending the related criminal proceedings, it "can prevent a claimant from taking advantage of civil discovery rules to learn about the government's criminal case and thus defeating the policies behind limited criminal discovery."). In *U.S. v. Lot 5*, 23 F.3d 359 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995), the claimant herself requested a stay on the ground that the government planned to indict her. She specifically argued "that a stay would have preserved her right to due process of law and her privilege against self-incrimination." *Id.* at 364. Her dilemma was whether to "remain silent and allow the forfeiture, or testify against the forfeitability of her property and expose herself to incriminating admissions that could be used in a subsequent criminal trial against her." *Id.* The Eleventh Circuit affirmed the district court's denial of the stay.

121. 21 U.S.C. § 881(a)(4)(C), (a)(6) & (a)(7) (1994). See also Austin, 509 U.S. at 617-21.

122. 21 U.S.C. § 881(a)(4)(C), (a)(6) & (a)(7). See also Bennis v. Michigan, 116 S. Ct. 994, 996 (1996) in which the United States Supreme Court purportedly adhered to "a long and unbroken line of cases [that hold] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."

123. Although lack of knowledge is equated with lack of actual knowledge, an owner, who is deemed to have remained willfully blind to the illegal use of his or her property, fails to prove lack of knowledge. See, e.g., *United States v. 121 Nostrend Ave.*, 760 F. Supp. 1015, 1033 (E.D.N.Y. 1991) (lack of knowledge means lack of willful blindness to facilitate purpose behind forfeiture statute); *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1185-86 (W.D. Tex. 1990), *aff'd*, 946 F.2d 30 (5th Cir. 1991) (attorney failed to meet standard by taking no steps to ensure that vehicle given as payment of fee was not an instrumentality of the charged crime). But see *United States v. Sonny Cook Motors*, 819 F. Supp. 1015, 1018 (N.D. Ala. 1993) ("If Cook had the obligation, either as a parent or as a landlord, to do everything reasonably necessary to assure that his real property was not used illegally by his son and tenant, he also met that obligation, that is, unless the forfeiture laws are to be stretched beyond their logical limits and are construed to require an owner to guarantee that his real property will not be



Pursuing the related civil forfeiture action in the wake of a criminal acquittal is also a good deal for the government. In such a situation, the forfeiture proceeding becomes a second chance at victory, only this time in the form of the confiscation of the acquittee's property. Specifically, the government's failure to prove guilt beyond a reasonable doubt in the criminal context neither precludes the government from establishing the mere probable cause for civil forfeiture nor ensures that the claimant will meet his or her preponderance-of-the-evidence burden.<sup>124</sup> As such, forfeiture provisions, like § 881, actually provide the government with an incentive to separate and stagger the criminal and civil proceedings.

### C. *Civil In Rem Forfeiture as Double Jeopardy: The Traditional Myths*

Courts typically give three somewhat intertwined reasons for finding double jeopardy protection to be unavailable to civil in rem forfeiture claimants.

First, before the Supreme Court's *Halper* decision, the distinction between the labels "civil" and "criminal" essentially controlled the analysis.<sup>125</sup> That is, because forfeiture proceedings were denominately "civil," the Supreme Court rejected the double jeopardy defense to actions in which the government sought civil sanctions for offenses that had been the subject of prior criminal proceedings.<sup>126</sup>

In this respect, *Helvering v. Mitchell*<sup>127</sup> was a seminal case. In *Mitchell*, a civil suit to collect a tax deficiency plus a statu-

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put to any illegal use, direct or indirect. This court has expressly refused to go so far."); See generally Michael D. Dautrich, *The 'Innocent Owner' Defense In Civil Drug Forfeitures After United States v. 92 Buena Vista Avenue: Still An Uphill Battle for Third-Party Claimants*, 3 WIDENER J. PUBL. L. 995 (1994) (exploring ways to alleviate the undue burdens of demonstrating innocence); Franze, *supra* note 9, at 371 ("The protection afforded to owners by the innocent owner defense is questionable, however, because two problems surround the defense: (1) chronic inconsistent judicial interpretation; and (2) the unforeseen repercussions of the Supreme Court decision *United States v. 92 Buena Vista Avenue* [113 S. Ct. 1126 (1993)]."). See also McClain, *supra* note 119, at 966-67 (discussing justification for finding that criminal narcotics offenses are not lesser included offense of civil forfeiture, which is that criminal statutes require criminal mens rea while civil statutes do not).

124. See *supra* note 116.

125. See *United States v. Halper*, 490 U.S. 435 (1985); see also *infra* Part II.A.

126. See generally Cheh, *supra* note 9, at 11-14 (discussing how the significance of the civil/criminal label is limited); Piety, *supra* note 18, at 943-46 (civil/criminal distinction).

127. 303 U.S. 391 (1938).

tory penalty after the defendant's acquittal for tax evasion, the Supreme Court determined "[t]hat acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based . . . ."<sup>128</sup> The Court emphasized that what was determinative of whether a proceeding was criminal was Congress' intent that the sanction constitute punishment.<sup>129</sup>

After *Mitchell*, the Supreme Court decided in *United States ex rel. Marcus v. Hess* that a civil qui tam suit for damages from contractors that engaged in bid rigging for which the defendants had been criminally convicted did not violate the Double Jeopardy Clause.<sup>130</sup> The *Hess* Court relied on the statutory construction approach of *Mitchell* to decide whether the statute was civil or criminal.<sup>131</sup> It concluded that the "remedy [did] not lose the quality of a civil action" even though more than the "precise amount" of damages was awarded and even though the award had the effect of punishment.<sup>132</sup>

Subsequently, the Supreme Court dealt with the civil-criminal distinction in a two-tiered test. Under *United States v. Ward*, the initial question is "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."<sup>133</sup> Then, if Congress had actually labeled the penalty as civil, unless there is the "clearest proof" that the provision is so punitive in purpose or effect, it is indeed conclusively civil.<sup>134</sup>

In fact, the *Ward* test figured centrally in the Supreme Court's decision in *United States v. One Assortment of 89 Firearms* that double jeopardy did not prevent the forfeiture of property after the defendant was acquitted of the related criminal charges.<sup>135</sup> In concluding that Congress intended the forfeiture proceedings to be civil, the Court said that "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy

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128. *Id.* at 397.

129. *Id.*

130. 317 U.S. 537 (1943).

131. *Id.* at 549.

132. *Id.* at 550; See also *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) (rejecting defendants' double jeopardy claim and relying on *Mitchell* in a case involving a civil sanction following a prior criminal conviction).

133. 448 U.S. 242, 248 (1980).

134. *Id.* at 248-49 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

135. 465 U.S. 354 (1984).

Clause is not applicable."<sup>136</sup> As such, before *Halper*, the Congressional nomenclature of "civil" or "criminal" was the presiding dictator.

Second, before *Halper*, the "remedial" label, often treated as somewhat interchangeable with "civil," was another determinative factor.<sup>137</sup> This was the gist of the Supreme Court's discussion in *One Lot Emerald Cut Stones v. United States*, which contained the explanation that "forfeiture is intended to aid in the enforcement of tariff regulations."<sup>138</sup> What the Court in *One Lot Emerald Cut Stones* said was that "[forfeiture] prevents *forbidden merchandise* from circulating the United States. . . . [I]n other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions."<sup>139</sup> Courts, however, have not only used the "remedial" adjective to describe the seizure of dangerous items or contraband, but have also similarly likened forfeiture penalties to a tax or a type of "liquidated damages" or a form of governmentally imposed compensatory damages.<sup>140</sup>

Third, before the *Austin* decision, the guilty property fiction also sporadically paraded as an excuse for denying property owners certain constitutional protections.<sup>141</sup> Because civil in rem forfeiture was indeed in rem, that meant that the property had committed and was being charged with the wrongdoing.<sup>142</sup> In fact, the language in one of the classic cases, *Dobbins Distillery v. United States*,<sup>143</sup> exemplifies such a mind set.

In *Dobbins Distillery*, the Supreme Court approved the forfeiture of a distillery leased to an operator who defrauded revenue officers by concealing and altering sales records.<sup>144</sup> The Court stressed that "the offence . . . is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal

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136. *Id.* at 362 (citing *Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938)).

137. See generally Hauert, *supra* note 9, at 183 (remedial forfeiture); Piety, *supra* note 18, at 946-63 (civil forfeiture justified as remedial).

138. 409 U.S. 232, 237 (1972).

139. *Id.* (emphasis added).

140. *Id.* See also Hauert, *supra* note 9, at 183; Piety, *supra* note 18, at 954-59.

141. See generally Ator, *supra* note 9, at 101-19; Hauert, *supra* note 9, at 159-60; Kessler, *supra* note 9, at 207; Piety, *supra* note 18, at 917-20, 967-73; Pollock, *supra* note 18, at 462-63. See also *Bennis v. Michigan*, 116 S. Ct. 994, 998-99 (1996) (addressing cases which allow an owner's interest in property to be forfeited even though the owner did not know that the property was to be put to an illegal use).

142. See *supra* notes 72-76 and accompanying text.

143. 96 U.S. 395 (1877).

144. *Id.* at 403-04.

misconduct or responsibility of the owner . . . ."<sup>145</sup>

In *Various Items Of Personal Property v. United States*,<sup>146</sup> the guilty property myth became the centerpiece in the Supreme Court's rejection of double jeopardy protection for a civil forfeiture claimant. In *Various Items*, the distilling corporation had to forfeit a distillery, warehouse and denaturing plant because of a violation of the law.<sup>147</sup> In fact, the corporation had been convicted of the criminal offenses before commencement of the forfeiture proceeding and the Government even admitted that the conviction was predicated upon "the transactions set forth . . . as a basis for the forfeiture."<sup>148</sup> In rejecting the corporation's double jeopardy argument, the Court said:

[This] forfeiture proceeding . . . is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. The forfeiture is no part of the punishment for the criminal offense.<sup>149</sup>

Such language in *Various Items* captures the mind set: because the guilty property myth fictively casts the property owners as non-defendants, courts tended not to recognize that such owners needed the Constitutional protections afforded human beings who are criminally accused.<sup>150</sup>

Until *Halper*, *Austin* and *Kurth Ranch*, courts accepted that there was no constitutional impediment to the government's pursuance of civil confiscation of a defendant's property before or after the predicate criminal proceeding. Because such forfeiture was civil or remedial and putatively lodged against the cul-

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145. *Id.* at 401. See also *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (discussing the analogy between the law of deodand and "ascribing to the property a certain personality, a power of complicity and guilt in the wrong."); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."). See generally *Bennis v. Michigan*, 116 S. Ct. at 998-99.

146. 282 U.S. 577 (1931).

147. *Id.* at 578.

148. *Id.* at 579.

149. *Id.* at 581.

150. But see *Boyd v. United States*, 116 U.S. 616 (1886) (compulsory production of private papers for use in a proceeding to forfeit property violates the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause); see also *United States v. Ursery*, 116 S. Ct. 2135, 2154-55 (1996) (Stevens, J., concurring in part and dissenting in part).

pable res, such a separate proceeding did not even have a whisper of a double jeopardy problem.

The myths that traditionally warded off double jeopardy protection for the forfeiture claimants, however, were in reality toxic. In allowing multiple punitive proceedings, these myths effectually thwarted finality and encouraged potential prosecutorial harassment in what has to be one of the most inherently governmentally oppressive arenas—that of forfeiture.<sup>151</sup> In truth, forfeiture is precisely *the* context in which Constitutional protections are not just needed—but absolutely essential. This is true because the rules, procedures and expansive clench of forfeiture provisions enfeeble the accused and simultaneously fortify the government gladiators. In so doing, the forfeiture mechanism augments an already outrageous power disparity.

Also, because forfeiture can swoop down on such a vast array of property, individuals that had already been punished and were also often unrepresented can lose all or what little they have left. In practical effect, this will not infrequently mean that when and if the forfeiture losers emerge from prison, they must begin or try to begin again—but do so without all or most of their worldly possessions. In this respect, the punishment of forfeiture is not just multiple, but seemingly eternal.

## II. THE DEMISE OF THE TRADITIONAL FORFEITURE MYTHS AFTER *Halper*, *Austin* and *Kurth Ranch*

The decisions in *United States v. Halper*,<sup>152</sup> *Austin v. United States*<sup>153</sup> and *Department of Revenue of Montana v. Kurth Ranch*<sup>154</sup> really have the combined effect of eradicating the traditional myths that made certain constitutional protections unavailable to civil forfeiture claimants.

### A. *United States v. Halper: The Overthrow of the "Civil" and "Remedial" Tyrants and the Detrimental Myopic Fixation on Multiple Punishments*

1. *The Halper Decision.* Halper, the manager of New York Medical Laboratories, submitted sixty-five separate false claims for reimbursement to Blue Cross and Blue Shield of Greater New York, a fiscal intermediary for medicare.<sup>155</sup> Blue Cross over-

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151. See *supra* notes 14-18 and accompanying text.

152. 490 U.S. 435 (1989).

153. 509 U.S. 602 (1993).

154. 511 U.S. 767 (1994).

155. *Halper*, 490 U.S. at 437. Halper mischaracterized the medical services and de-

paid a total of \$585 and then passed these overcharges along to the federal government.<sup>156</sup> Consequently, the government indicted Halper on sixty-five counts of violating the criminal false-claims statute.<sup>157</sup> After Halper's conviction on all counts plus sixteen counts of mail fraud, the district judge sentenced Halper to imprisonment for two years and fined him \$5,000.<sup>158</sup>

Based on the facts established in the criminal case, the district court granted summary judgment in favor of the government in its subsequent civil suit against Halper under the Federal False Claims Act.<sup>159</sup> The problem was that the supposed remedial provision of the False Claims Act exposed Halper to a statutory penalty of more than \$130,000.<sup>160</sup> The district court was of the view that a penalty this large on top of Halper's criminal punishment would violate the double jeopardy clause. Specifically, the district court concluded that the authorized recovery of more than \$130,000 bore no "rational relation" to the sum of the government's \$585 actual loss plus its costs in investigating and prosecuting Halper's false claims.<sup>161</sup> Thus, the district court interpreted the statutory penalty as discretionary and approximated an amount of \$16,000 as reimbursement to the government.<sup>162</sup>

Later, when the government moved for reconsideration, the district court confessed error in its finding that the \$2,000 statutory penalty was not mandatory for each count.<sup>163</sup> The court nevertheless adhered to its view that the statutorily authorized penalty, which was more than 220 times greater than the gov-

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manded reimbursement at the rate of \$12 per claim when New City was really only entitled to \$3 per claim. *Id.*

156. *Id.*

157. *Id.* ("18 U.S.C. § 287 prohibits 'mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent.'").

158. *Id.*

159. It is a violation of the False Claims Amendment Act of 1986 for "[a]ny person . . . (2) [to] knowingly make[], use[], or cause[] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. §§ 3729-3731 (1994).

160. One who violates the False Claims Amendment Act of 1986 is "liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." 31 U.S.C. § 3729 (1994). The False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, increased the civil penalty to "not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person" and "the costs of a civil action brought to recover any such penalty or damages." 31 U.S.C. § 3729(a)(7) (1994).

161. *United States v. Halper*, 660 F. Supp. 531, 533 (S.D.N.Y. 1987).

162. *Id.* at 534.

163. *United States v. Halper*, 664 F. Supp. 852, 853-54 (S.D.N.Y. 1987).

ernment's measurable loss, qualified as punishment under the double jeopardy clause.<sup>164</sup> After deeming the Act unconstitutional as applied to Halper, the district court entered an amended judgment, which limited the government's recovery to double damages of \$1,170 and the costs of the civil action.<sup>165</sup>

On direct appeal, the United States Supreme Court agreed with the district court that "the disparity between its approximation of the Government's costs and Halper's \$130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy."<sup>166</sup> However, the Supreme Court remanded the case to give the government an opportunity to present the district court with evidence of its actual costs arising from Halper's conduct and to seek an adjustment of the amount.<sup>167</sup>

The Supreme Court concluded that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."<sup>168</sup> Because the parties did not dispute that the criminal proceeding against Halper resulted in punishment and that the civil and criminal proceedings concerned the same conduct, the issue in *Halper* was quite narrow. The Court's real focus was thus on the question of whether the civil False Claims Act penalty amounted to a second "punishment."<sup>169</sup>

In arguing no punishment, the government relied primarily on the three Supreme Court cases, *Helvering v. Mitchell*,<sup>170</sup> *United States ex rel. Marcus v. Hess*,<sup>171</sup> and *Rex Trailer Co. v. United States*,<sup>172</sup> and contended that a penalty assessed in a civil proceeding could not trigger the double jeopardy bar.<sup>173</sup> The Supreme Court, however, felt that the government had "over-

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164. *Id.*

165. *Id.* at 855.

166. *United States v. Halper*, 490 U.S. 435, 452 (1989) (Kennedy, J, concurring).

167. *Id.*

168. *Id.* at 448-49.

169. *Id.* at 441.

170. 303 U.S. 391 (1938). See *supra* notes 127-29 and accompanying text.

171. 317 U.S. 537 (1943). See *supra* notes 130-32 and accompanying text.

172. 350 U.S. 148 (1956). See *supra* note 132.

173. *Halper*, 490 U.S. at 441. The government also relied on *United States v. Ward*, 448 U.S. 242 (1980) for the proposition that "whether a proceeding or penalty is civil or criminal is a matter of statutory construction, and that Congress clearly intended the proceedings and penalty at issue here to be civil in nature." *Id.* See also *supra* text accompanying notes 133-134.

read the holdings" of those cases and that the cases did not "foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment."<sup>174</sup>

Specifically, in all three of the government's cases, the Supreme Court had fixed on the statute itself. The *Mitchell* decision, which the Court felt was "at most of tangential significance," stood for the proposition that whether a statutory sanction is criminal in nature is a question of statutory construction.<sup>175</sup> Similarly, in *Hess*, the Court rejected the double jeopardy argument by reference to the statute, which, in its view, was purely remedial and "designed to 'protect the government from financial loss[.]'"<sup>176</sup> Also, in *Rex Trailer*, the measure of recovery under the statute was not "so unreasonable or excessive" as to constitute a second criminal punishment.<sup>177</sup> As such, the *Halper* Court saw these cases as a collective endorsement of "rough remedial justice."<sup>178</sup>

In *Halper*, the government also argued that punishment can ensue only in criminal proceedings and that statutory construction is what determines whether proceedings are criminal or civil.<sup>179</sup> Although the Court agreed that "recourse to statutory language, structure and intent is appropriate in identifying the inherent nature of a proceeding," it stressed that courts can identify a double jeopardy violation only by analyzing the sanctions imposed on the individual.<sup>180</sup> This, according to the Court, is because the Double Jeopardy Clause protects "humane interests," which are "intrinsically personal."<sup>181</sup>

The *Halper* Court distinctly disposed of the autocratic reign of the proverbial labels, "criminal" and "civil." It instead defined a civil or criminal sanction as punitive "when the sanction as applied in the individual case serves the goals of punishment," or "the twin aims of retribution and deterrence."<sup>182</sup> Acknowledging that the punishment inquiry is not always an "exact pursuit," the Court left to trial courts the discretion to make the de-

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174. *Halper*, 490 U.S. at 441-42.

175. *Id.* at 443.

176. *Id.* at 444 (quoting *Hess*, 317 U.S. at 548-49).

177. *Id.* at 446 (quoting *Rex Trailer Co.*, 350 U.S. at 154).

178. *Id.*

179. *Id.* at 441.

180. *Id.* at 447.

181. *Id.*

182. *Id.* at 448.



termination.<sup>183</sup> This determination may often amount to nothing more than "an approximation."<sup>184</sup>

The *Halper* Court also defined the options that its decision left open for the government. The Court said that the government can still seek the full civil penalty against a defendant who had not been previously punished for the same conduct.<sup>185</sup> This course was available to the government even if the civil sanction was indeed punitive.<sup>186</sup> Also, the government could seek and obtain both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding.<sup>187</sup> Such joinder, as the Court opined, would ensure that the total punishment did not exceed what the statute authorized.<sup>188</sup>

2. *The Real Impact of the Halper Decision.* Beneath the surface, the *Halper* analysis is somewhat self-enervating. Although the *Halper* Court had a pragmatic approach to civil penalties in two respects, its framing of the double jeopardy issue as one involving purely successive punishments dilutes the very constitutional right that the Court purports to recognize.

First, the *Halper* Court toppled what had been the long-standing supremacy of the legislative labels, "civil" and "criminal," and stated that "[they] are not of paramount importance."<sup>189</sup> Further, the Court abandoned the once controlling legislative intent analysis and instead required a judicial assessment of the *actual* impact the civil sanction has on an *individual* who has already been criminally punished for the same offense. Consequently, with respect to a potential multiple punishment situation, courts must make a threshold determination of whether the particular sanction at issue performs the punitive function of retribution and deterrence.<sup>190</sup> In fact, even if a

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183. *Id.* at 449.

184. *Id.* at 449-50.

185. *Id.* at 450.

186. *Id.*

187. *Id.*

188. *Id.* Justice Kennedy authored a concurring opinion in *Halper* in which he stressed that the "rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages." *Id.* at 452-53. He, however, agreed with the Court that in the case before them "the controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government." *Id.* at 453.

189. *Id.* at 447. See also *Hicks v. Feiock*, 485 U.S. 624, 631 (1988) ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.").

190. *Halper*, 490 U.S. at 448. See also *Department of Revenue of Montana v. Kurth*

remedial purpose concurs with such retributive or deterrent goals, the sanction nevertheless amounts to punishment.<sup>191</sup>

Second, the *Halper* Court receded from the proposition that the double jeopardy clause does not bar a civil proceeding because civil is essentially synonymous with "remedial."<sup>192</sup> Basically, the *Halper* Court acknowledged that where a civil penalty, imposed in a proceeding against a defendant that has already sustained a criminal punishment, "bears no rational relation to the goal of compensating the Government for its loss," then that civil penalty can not be deemed remedial.<sup>193</sup>

While the *Halper* Court's usurpation of the "civil" and "remedial" despotism paves the way for bestowing constitutional protections on certain individuals subjected to civil punishment, the Court's myopic perspective on the Double Jeopardy problem ultimately enfeebles the Court's accomplishments. What is particularly detrimental is the Court's fixation on the successive punishments' component of the Double Jeopardy Clause.<sup>194</sup> When the Court almost reflexively isolated the constitutional violation at issue as one of successive punishments, it in essence contradicted its own proclamation that "the labels 'criminal' and 'civil' [were] not of paramount importance."<sup>195</sup> That is, if a designated "civil" penalty can be the same as a criminal "punishment," then it is surely not a nonsequitorial stretch to connect a successive punitive civil proceeding to a "second prosecution."<sup>196</sup> As such, the demise of dogged deference to legislative labels, "civil" and "criminal," in the sphere of penalties, should surely seep into

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Ranch, 511 U.S. 767, 796 (1994) (O'Connor, J., dissenting) ("[under *Halper*,] the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case.").

191. *Halper*, 490 U.S. at 448.

192. *Id.* at 448-49.

193. *Id.* at 449.

194. See Eads, *supra* note 46, at 953 ("[T]he *Halper* Court clearly distinguished for the first time the 'multiple punishment' prong of double jeopardy protection from the other prongs of the clause—subsequent criminal actions filed after conviction or acquittal—and concluded that only the 'multiple punishment' prong applies to the government's use of certain civil sanctions."). But see Justice Scalia's dissenting opinion in *Kurth Ranch*, 511 U.S. at 799 (attributing "the belief that there is a multiple-punishments component of the Double Jeopardy Clause . . . to *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872 (1874)" and discussion *infra* Part III.C.2-3.

195. *Halper*, 490 U.S. at 447.

196. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). See also *Kurth Ranch*, 511 U.S. at 805 (Scalia, J. dissenting) (acknowledging that "a few of the Supreme Court cases include statements to the effect that a proceeding in which punishment is imposed is criminal.").

the characterization of the proceedings themselves and accentuate the real congeneracy of punitive civil proceedings and criminal prosecutions.<sup>197</sup>

Also, the *Halper* Court's treatment of the issue before it as one of separate multiple punishments has the effect of dismantling the Double Jeopardy Clause. When the Court clarified how the government can avoid violating that supposedly separate "multiple punishment" provision, it effectively, gutted the Clause by excising its core finality protection. The Court stated that its decision did not "preclude[] the Government from seeking the full civil penalty against a defendant who previously has not *been punished* for the same conduct, even if the civil sanction imposed is punitive."<sup>198</sup> Read literally, such language condones the imposition of civil punishment on a defendant who was already acquitted in the parallel criminal case.<sup>199</sup> Such a construction of the Double Jeopardy Clause allows for redundant punitive ordeals, which engenders the very undue expense and mental anguish that the Clause aims to temper.<sup>200</sup>

In contrasting the effect of multiple punishments imposed in a single proceeding with successive punishments in separate proceedings, the *Halper* Court explained:

[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.<sup>201</sup>

Interestingly, the Court failed to acknowledge that its own decision allows the government to pursue a ploy not substantially different from what the purported successive punishments bar proscribes. Under *Halper*, the "dissatisfied" government, after failing to obtain a criminal conviction, can nevertheless seek punishment in the putatively "civil" counterpart. As such, after *Halper*, the avenues apparently still available to the government

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197. See *Kurth Ranch*, 511 U.S. at 784 (describing civil tax proceeding as "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'"). See also discussion *infra* Part III.C.

198. *Halper*, 490 U.S. at 450.

199. See generally Eads, *supra* note 46, at 953 ("Conceptually under traditional double jeopardy analysis, an accused individual who is acquitted has as much interest in not facing another punishment ordeal as one who is convicted, and if the civil sanction is punishment, an acquitted individual has as much interest in avoiding it as a convicted one.").

200. See *supra* Part I.A.

201. *Halper*, 490 U.S. at 451 n.10.

are even somewhat defiant of the objectives behind what is the supposed separate cumulative punishments' taboo.<sup>202</sup>

Also, after isolating the purported "multiple punishments" component as "the one at issue" and in extolling it as having "deep roots in our history and jurisprudence,"<sup>203</sup> the Court paradoxically exiled the prohibition from the historical and jurisprudential roots of not just the Double Jeopardy Clause, but also the whole Constitution. What, of course, undergirds the Constitution is that understood ligature between unchecked power and oppressive corruption.<sup>204</sup> The Double Jeopardy Clause's finality principle aspires to be an antidote to potential governmental overreaching and to mitigate what is inherent in criminal proceedings—namely, the coincidence of grossly unequal combatants.<sup>205</sup> The *Halper* Court, by authorizing—not multiple punishments—but multiple punitive *ordeal*s, ratified a tactic for prosecutorial overreaching and for augmenting the disturbing disparity in power.

In short, the Court in *Halper* paid lip service to double jeopardy protection as something to be praised as "intrinsically personal" and as safeguarding "humane interests."<sup>206</sup> In fact, as the *Halper* Court apparently saw it, even the once deific legislative captions of "civil" and "remedial" must yield to the constraints of the Clause.<sup>207</sup> Perplexingly, however, through its obsession with the supposed multiple punishments prong, the Court effectually derogated that sacrosanct "intrinsically personal" right to finality.<sup>208</sup> It also slighted that equally important related "humane

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202. See Eads, *supra* note 46, at 953 (arguing that "[t]he *Halper* Court ignored [the] finality interest by applying only the 'multiple punishment' prong of double jeopardy to civil sanctions.").

203. *Halper*, 490 U.S. at 440 (emphasis added).

204. See *supra* notes 63-64 and accompanying text.

205. See *supra* notes 62-66 and accompanying text.

206. *Halper*, 490 U.S. at 447. See generally Eads, *supra* note 46, at 953-54 (criticizing the *Halper* Court for distinguishing the Double Jeopardy Clause from other constitutional guarantees by suggesting that the "humane interests" of the Clause are "intrinsically personal" and arguing that there is almost no historical or judicial precedent for such a "rarified classification").

207. See generally James M. Curley, *Expanding Double Jeopardy*: Department of Revenue v. Kurth Ranch, 75 B.U. L. REV. 505, 512 (1995) ("By formulating the new nondeferential rational relationship test, the *Halper* Court rejected the statutory construction test and began the intrusion of double jeopardy analysis into the territory of civil proceedings."); Lynn C. Hall, Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper*, 109 S. Ct. 1892 (1989), 65 WASH. L. REV. 437, 446-47 (1990) (discussing how *Halper* affects legislatures by "restricting their power to determine civil sanctions unilaterally").

208. *Halper*, 490 U.S. at 447.

interest" an accused has in not being further diminished before the ostensibly awesome conglomerate of prosecutorial resources.

B. *Austin v. United States: The Overthrow of the Guilty Property Fiction and Acknowledgement that Forfeiture is Punishment Per Se*

1. *The Austin Decision.* The *Austin* case began with an indictment for violation of South Dakota's drug laws.<sup>209</sup> After Austin pleaded guilty to one count of possessing cocaine with intent to distribute, the state court sentenced Austin to seven years in prison.<sup>210</sup> Subsequently, the United States commenced an in rem action in federal court seeking forfeiture of Austin's mobile home and auto body shop.<sup>211</sup>

In the affidavits in support of the government's motion for summary judgment, the police officer tried to connect the mobile home and the body shop with the illegal conduct: "Austin met Keith Engebretson at Austin's body shop on June 13, 1990, and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine, which he sold to Engebretson."<sup>212</sup> Also, the affiant said that a search of the body shop and mobile home revealed "small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately \$4,700 in cash."<sup>213</sup>

When Austin opposed the government's motion by arguing that the forfeiture of his home and business would violate the Eighth Amendment,<sup>214</sup> the district court found in favor of the government and the Eighth Circuit affirmed.<sup>215</sup> Because of an apparent conflict between the Eighth and Second Circuits over the application of the Eighth Amendment to in rem civil forfeitures, the United States Supreme Court granted certiorari.<sup>216</sup>

The Supreme Court preliminarily focused on *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>217</sup> which was the only case in which it had considered the Eighth Amendment's Exces-

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209. *Austin v. United States*, 509 U.S. 602, 604 (1993).

210. *Id.*

211. *Id.* at 604-05. The forfeiture provisions were 21 U.S.C. § 881(a)(4) and (a)(7). See also *supra* notes 94-99 and accompanying text.

212. *Austin*, 509 U.S. at 605.

213. *Id.*

214. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

215. *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992).

216. *Austin*, 509 U.S. at 606.

217. 492 U.S. 257 (1989).

sive Fines Clause. What the *Browning-Ferris* Court honed in on was what the Eighth Amendment had in common with its ancestor, § 10 of the English Bill of Rights of 1689, which was the aim to prevent *the government* from abusing its power to punish.<sup>218</sup> Consequently, the *Browning-Ferris* Court concluded that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."<sup>219</sup>

The *Austin* Court, however, felt that in *Browning-Ferris*, it had not reached the question of whether the Excessive Fines Clause applies only to criminal cases.<sup>220</sup> This gap in *Browning-Ferris* was significant because the government, in seeking to extricate forfeiture from Eighth Amendment protection, urged the following historical perspective on the Court:

[A]ny claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a *criminal* punishment at the time the Eighth Amendment was adopted.<sup>221</sup>

As a fall-back, the government contended that the only way the Eighth Amendment could apply to a civil proceeding was if that proceeding was "so punitive that it must be considered criminal."<sup>222</sup>

In rejecting the government's theories, the Supreme Court distinguished the Eighth Amendment from the Fifth and the Sixth Amendments, both of which were indeed limited to criminal cases.<sup>223</sup> As the Court emphasized, the Eighth Amendment had neither an express limitation to criminal cases nor a history that confined it as such.<sup>224</sup>

The *Austin* Court then explored the basic purpose of the Eighth Amendment, which was to limit the government's power

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218. *Id.* at 266-67.

219. *Id.* at 268.

220. *Austin*, 509 U.S. at 609.

221. *Id.*

222. *Id.* The government relied on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980).

223. *Austin*, 509 U.S. at 607.

224. *Id.* at 607-10. The Court noted that while the original version of Section 10 of the English Bill of Rights that was introduced in the House of Commons had language restricting its application to criminal cases, that restriction only applied to the excessive bail clause. As such, the "absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases." *Id.* at 609. In fact, in the final draft, even that one reference to criminal cases in the bail clause was omitted. *Id.*

to punish.<sup>225</sup> Reiterating the language of the *Halper* decision, the Court said that "the notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."<sup>226</sup> The Court thus chiseled the question down to whether forfeiture is punishment—not whether it had a civil or criminal label.

For the Court, answering the real question entailed a backward glance to the time of ratification of the Eighth Amendment and consideration of whether "forfeiture was understood at least in part as punishment" at that time.<sup>227</sup> As the Court concluded, all three English forms of forfeiture—deodand, forfeiture upon conviction for a felony or treason and statutory forfeiture—were indeed punitive.<sup>228</sup> Further, as the Court pointed out, the First Congress that enacted the laws that subjected ships and cargo involved in customs offenses to seizure also viewed forfeiture as punishment.<sup>229</sup> In fact, in one such Act, Congress specifically relegated the forfeiture of goods and the vessel to the punishment provisions.<sup>230</sup>

In addition, the Supreme Court construed its own decisions as characterizing statutory in rem forfeiture as punitive. Amongst these were the cases in which the Supreme Court rejected the innocent owner as a common law defense to forfeiture.<sup>231</sup> The *Austin* Court read such decisions, including *Calero-Toledo*, as predicated on the theory that because the owners were negligent in allowing others to misuse their property, such owners were being punished.<sup>232</sup> The Court even recognized that the notion of forfeiture as punitive had endured in spite of the age-old forfeiture fiction "that the thing is primarily considered the offender."<sup>233</sup>

To bolster its reading of the innocent owner cases as recognition of the punitive nature of forfeiture, the Court referred to

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225. *Id.* at 609.

226. *Id.* at 610 (citing *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

227. *Id.*

228. *Id.* at 611. See *supra* notes 76-88 and accompanying text.

229. *Austin*, 509 U.S. at 613.

230. The *Austin* Court is referring to the Act of July 31, 1789, § 12, 1 Stat. 39., which provided that "goods could not be unloaded except during the day and with a permit." *Austin*, 509 U.S. at 613.

231. The Court referred to *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *J. W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) and *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). See also *Bennis v. Michigan*, 116 S. Ct. 994 (1996).

232. *Austin*, 509 U.S. at 611.

233. *Id.* at 615. See *supra* notes 72-75 and accompanying text.

the "more recent cases [that] have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner."<sup>234</sup> As the *Austin* Court saw it, such cases have language suggesting that true innocence on the part of the owner could raise serious constitutional issues and this had to have ensued from "an assumption that forfeiture serves in part to punish."<sup>235</sup>

After its historical analysis, the Court considered whether forfeiture under the statutes before it are presently considered punishment. While the Court "[found] nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment[,]" it noted that the provisions involved in *Austin* actually had an express "innocent owner" defense.<sup>236</sup> By excusing the "innocent," and thus fixing on the culpable, the provisions "look more like punishment . . ." than those actually involved in drug trafficking.<sup>237</sup>

Finally, the Court rejected the government's invitation to categorize drug trafficking forfeiture as remedial. As the Court noted, while forfeiture of contraband *can* have the remedial effect of removing dangerous or illegal items from society, there was nothing inherently criminal or illegal about the actual res—the mobile home and body shop—in the *Austin* case.<sup>238</sup> Also, the Court dismissed the government's position that forfeiture is remedial because the assets serve as "a reasonable form of liquidated damages."<sup>239</sup> One problem, according to the Court, was the "dramatic variations" in the value of the forfeitable property.<sup>240</sup> As the Court pointed out, even if forfeiture statutes have *some* remedial goals, the fact that they *also* serve to punish makes them unequivocally punitive.<sup>241</sup>

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234. *Austin*, 509 U.S. at 617 (citing *Calero-Toledo*, 416 U.S. at 689-90; *Goldsmith-Grant Co.*, 254 U.S. at 512).

235. *Id.* After *Austin*, however, the Supreme Court said in *Bennis v. Michigan*, 116 S. Ct. 994, 999 n.5 (1996) that in *Austin*, it had observed that *J. W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921) "expressly reserved the question whether the [guilty-property] fiction could be employed to forfeit the property of a truly innocent owner" and remarked that the *Austin* "observation [was] quite mistaken."

236. *Austin*, 509 U.S. at 618 (citing 21 U.S.C. § 881(a)(4)(C) and (a)(7)). See *supra* notes 121-22 and accompanying text.

237. *Austin*, 509 U.S. at 619.

238. *Id.* at 621-22.

239. *Id.* at 619 (quoting *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)). But see *Bennis v. Michigan*, 116 S. Ct. 994, 1000 (1996) ("[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose"). See also *supra* notes 137-40 and accompanying text.

240. *Austin*, 509 U.S. at 621.

241. Justice Scalia, concurring in part and concurring in the judgment, said that he



2. *The Real Effect of the Austin Decision.* What the *Halper* Court envisioned was a case-by-case analysis to ensure that a potentially punitive civil judgment imposed on an already criminally punished defendant was rationally related to the goal of making the government whole.<sup>242</sup> The *Halper* decision thus contemplated an individual accounting of the government's damages and costs to determine whether the civil penalty constitutes a second punishment. The *Austin* decision, however, eliminated the necessity for such an ad hoc inquiry with respect to civil in rem forfeiture.<sup>243</sup>

*Austin* stands for the proposition that *all* forfeiture is punishment. Such a *per se* rule flows from the Court's reliance on a

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"would have reserved the question without engaging in the misleading discussion of culpability." *Id.* at 626. He, however, would conclude that "the *in rem* forfeiture in this case is a fine" because the statute, "in contrast to the traditional *in rem* forfeiture, requires that the owner not be innocent—that he have some degree of culpability for the 'guilty' property" and because there is no "consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited." *Id.* Justice Kennedy, with whom Chief Justice Rehnquist and Justice Thomas joined, also concurred and explained that he was "not convinced that all *in rem* forfeitures were on account of the owner's blameworthy conduct" and that "[s]ome impositions of *in rem* forfeiture may have been designed either to remove property that was itself causing injury . . . or to give the court jurisdiction over an asset that it could control in order to make injured parties whole." *Id.* at 629. He also indicated that he would reserve the question of whether in rem forfeitures are always punitive. *Id.*

242. Matthew H. Lembke in *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper*, 76 VA. L. REV. 1251, 1266-67 (1990), explains that the *Halper* Court's approach is not clearly ad hoc, but somewhat confusing:

On the one hand, *Halper* emphasizes the need for a case-by-case analysis to determine whether a 'measure of recovery . . . [is] so unreasonable or excessive' that it transforms what was clearly intended as a civil remedy into a criminal penalty. On the other hand, enigmatic dictum in *Halper* suggests that, in certain circumstances, the question of whether the sanction is punishment or not can be resolved by reference to the legislative purpose behind the sanction.

(footnotes omitted); see also Hall, *supra* note 207, at 448 (discussing how courts must apply the *Halper* rule on a case-by-case basis).

243. Kessler, *supra* note 9, at 215 describes the effect of *Austin* in combination with *Halper* as follows:

The *Austin* court relied heavily upon *Halper* to reach its result. If civil forfeiture now constitutes punishment, and double jeopardy bars a subsequent prosecution, to paraphrase Edward G. Robinson, Mother of Mercy, is this the end of Civil Forfeiture? To quote another cult figure, Garth, from *Wayne's World*, Not!

(footnotes omitted). See also McClain, *supra* note 119, at 976-83 (arguing that *Austin* supports the view that all forfeiture is punishment). After *Austin*, however, the Supreme Court appeared to recede somewhat from the *per se* punitive approach. In *Bennis v. Michigan*, 116 S. Ct. 994, 1000 (1996), for example, the Court said that "forfeiture also serves a deterrent purpose distinct from any punitive purpose."

broad historical analysis and its examination of decisions rejecting the common law "innocent owner" defense. In fact, almost all of the reasons that lead the *Austin* Court to deem the forfeiture provisions at issue to be punitive will logically pertain to any and all forfeiture schemes.<sup>244</sup>

In reviewing the three kinds of forfeiture extant in England at the time of the Eighth Amendment's ratification, the *Austin* Court stressed that each imposed punishment.<sup>245</sup> Also, forfeiture's punitive character, as the *Austin* Court opined, immigrated to the United States.<sup>246</sup> In the process of following this historical path and tracking the Supreme Court's treatment of the common law innocent owner defense, the *Austin* Court extirpated the guilty property myth. It essentially viewed the guilty property language as a shortcut encapsulation of the notion that it is "the owner [who] has been negligent in allowing his property to be misused and that [it is the owner who] is properly punished for that negligence."<sup>247</sup>

The *Austin* Court also concluded that it had never used the guilty property fiction as a justification of forfeiture where the owner was truly innocent or "had done all that reasonably could be expected to prevent the unlawful use of his property."<sup>248</sup> In

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244. See generally McClain, *supra* note 119, at 976-77 (explaining that the *Austin* Court "based its decision on the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish[,] . . . [and because] [t]hese three factors equally apply to section 881(a)(6), . . . it should therefore follow that the section does indeed inflict punishment."). But see Ator, *supra* note 9 (arguing that *Austin* may be limited to situations where the property subject to forfeiture was used to facilitate a crime and may not apply to proceeds forfeiture); Daniel P. Buckley, *A Proposed Measure for Excessiveness After Austin v. United States Put a Twist on the Forfeiture Laws*, 29 GONZ. L. REV. 621, 630 (1993/94) (arguing that forfeiture of proceeds is not punishment). See also *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), cert. denied 115 S. Ct. 573 (1994); discussion *infra* at Part III.B.

245. *Austin*, 509 U.S. at 611. With respect to the deodand, when the forfeited object became a source of crown revenue, the institution became more perceivedly one that punished a property owner for carelessness. As the *Austin* Court acknowledged, the whole thrust of forfeiture of estate was to punish felons and traitors. *Id.* at 612. Further, according to the *Austin* Court, the English forfeiture statutes, like the Navigation Acts of 1660, aimed to penalize negligence. *Id.*

246. *Id.* at 613-14. The First Congress that passed laws subjecting ships and cargos involved in customs offenses to forfeiture viewed it as punishment. *Id.* at 613. In fact, in the Act of July 31, 1789, Congress put the forfeiture of the goods and vessel into the punishment category. *Id.*

247. *Id.*

248. *Id.* at 616. But see *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (holding that the Constitution does not protect wife's interest against forfeiture by the government even though she did not know that her car would be used in an illegal activity that would subject it to forfeiture).

fact, the *Austin* Court construed its more recent decisions, the ones expressly reserving the question of the truly innocent owner, as founded on the assumption that forfeiture does indeed function as punishment.<sup>249</sup> Further, according to the Court, the alternate justification of forfeiture of an innocent owner's property—that of holding an owner vicariously accountable for the wrongs of others—is similarly premised on the concept of a blameworthy owner.<sup>250</sup>

The reasoning in *Austin* can not be honestly confined to just the § 881(a)(4) and (a)(7) forfeitures at issue.<sup>251</sup> Even where the *Austin* Court honed in on the statutory provisions, it found that they corroborated the conclusions that the Court had already reached through the predominantly historical analysis.<sup>252</sup> In particular, the Court pointed out that although § 881 differs from traditional forfeiture statutes by containing an innocent owner defense, that aspect alone is not what makes the provisions punitive—but actually *more* punitive because they stress the owner's culpability.<sup>253</sup> Further, the Court indicated that the fact that Congress actually tied the forfeiture to the commission of the drug offenses solidifies what is already their innately punitive character.<sup>254</sup>

In addition, the *Austin* Court furthered what the *Halper* Court inaugurated—the overthrow of the very tyrannical “civil” and “remedial” labels that kept constitutional protections away from the forfeiture domain. In so doing, the Court reiterated what it said in *Halper*, that “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”<sup>255</sup> It also rejected the government's position that the civil provisions are remedial because they remove the “instruments” of the drug trade from the community

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249. *Austin*, 509 U.S. at 617. *But see Bennis*, 116 S. Ct. at 999 n.5 (Court receded from its view that it had “expressly reserved the question whether the [guilty property] fiction could be employed to forfeit the property of a truly innocent owner.”).

250. *Austin*, 509 U.S. at 618.

251. *See supra* notes 235-37. *See also Austin*, 509 U.S. at 629 (Justice Kennedy, with whom Chief Justice Rehnquist and Justice Thomas join, concurring in part and concurring in the judgment, would “reserve the question whether *in rem* forfeitures always amount to intended punishment . . .”). Such a concurrence, of course, suggests that the *Austin* Court did *not* reserve and thus, *reached* the conclusion that such forfeitures *always* amount to punishment.

252. *See supra* notes 235-37.

253. *Austin*, 509 U.S. at 617. *See also Bennis*, 116 S. Ct. at 1000 (statutory innocent owner defense is additional evidence that the statute itself is punitive in motive) (citing *Austin*, 509 U.S. at 616-19).

254. *Austin*, 509 U.S. at 618.

255. *Id.* at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

and serve as governmental compensation.<sup>256</sup>

Although there is language in *Austin* admitting that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous illegal items from society," the Court did not go so far as to suggest that some forfeitures are non-punitive.<sup>257</sup> By underscoring the fact that "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence,"<sup>258</sup> the Court deemed forfeiture to be at least a remedial and punitive admixture, which thus means that it is punishment.

C. *Department of Revenue of Montana v. Kurth Ranch: The Incipient Overthrow of the Myopic Fixation on Multiple Punishments and Endorsement of an Understanding of Parallel Civil and Criminal Proceedings as Separate Per Se*

1. *The Kurth Ranch Decision.* The focus in *Kurth Ranch* was on Montana's Dangerous Drug Tax Act, which imposed a tax "on the possession and storage of dangerous drugs" and provided that such a tax was to be "collected only after any state or federal fines or forfeitures have been satisfied."<sup>259</sup> Under the Act, the amount of tax could be ten percent of what the Montana Department of Revenue determined was the market value of the drugs or a specified amount depending on the type of drug, whichever was greater.<sup>260</sup>

The Montana Department of Revenue required taxpayers to file a return within seventy-two hours of their arrest.<sup>261</sup> The rule stated that "[a]t the time of arrest law enforcement personnel shall complete the dangerous drug information report as required by the department and afford the taxpayer an opportunity to sign it."<sup>262</sup> If the taxpayer, however, refused to sign, the rule required the law enforcement officers to file it themselves.<sup>263</sup>

About two weeks after the Drug Tax Act went into effect, Montana law enforcement officers raided the Kurth farm, arrested the Kurths and confiscated marijuana plants and para-

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256. *Austin*, 509 U.S. at 620.

257. *Id.*

258. *Id.* at 622 n.14.

259. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 770 (1994) (citing MONT. CODE ANN. § 15-25-111(1), (3) (1987)).

260. MONT. CODE ANN. § 15-25-111(2)(a)-(b)(vi).

261. *Kurth Ranch*, 511 U.S. at 773 (citing MONT. ADMIN. R. 42.34.102(3) (1988)).

262. *Kurth Ranch*, 511 U.S. at 771 (quoting MONT. ADMIN. R. 42.34.102(3) (1988)).

263. *Id.*

phernalia.<sup>264</sup> In one of the several proceedings that ensued from the raid, the State charged various members of the Kurth family with conspiracy to possess drugs with intent to sell or, in the alternative, possession of drugs with the intent to sell.<sup>265</sup> After each defendant entered into a plea agreement, the court sentenced two family members to prison and imposed suspended or deferred sentences on the others.<sup>266</sup>

In a second proceeding, the county attorney sought forfeiture of cash and equipment that the Kurth family used in the marijuana operation.<sup>267</sup> Because the law enforcement officers destroyed the drugs after inventory, the drugs were not part of this proceeding.<sup>268</sup> Ultimately the Kurth family settled that action by agreeing to forfeit cash and various other items.<sup>269</sup>

In a third proceeding, the Montana Department of Revenue, acting under the aegis of the new Drug Tax Act, attempted to collect about \$900,000 in taxes on the marijuana and hash products.<sup>270</sup> Although the Kurths initially contested the assessment, their subsequent petition for bankruptcy under Chapter 11 automatically stayed the collection proceedings.<sup>271</sup>

In the fourth case in bankruptcy court, the Kurths not only objected to the Department's proof of claim for the unpaid drug taxes, but challenged the constitutionality of the Drug Tax Act itself.<sup>272</sup> The bankruptcy court determined that most of the assessment was invalid as a matter of state law.<sup>273</sup> It concluded that although the Act authorized a portion of the assessment, it was nevertheless unconstitutional.<sup>274</sup> The court, relying on *Halper*, saw the assessment, which served to deter and punish, as amounting to double jeopardy.<sup>275</sup>

The district court agreed with the bankruptcy judge.<sup>276</sup> Although the Ninth Circuit affirmed, it based its conclusion primarily on the State's failure to present evidence justifying the

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264. *Id.* at 774.

265. *Id.* at 772 (citing MONT. CODE ANN. §§ 45-4-102, 45-9-103 (1987)).

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 774.

271. *Id.* at 775.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

tax.<sup>277</sup> The Supreme Court granted certiorari because the Ninth Circuit decision conflicted with a Montana Supreme Court decision.<sup>278</sup>

After initially acknowledging that *Halper* did not answer the question before it—"whether Montana's tax should be characterized as punishment"—the Supreme Court emphasized that it had never before found a tax to violate the Double Jeopardy Clause.<sup>279</sup> The Court, however, looked back at its decision in *Helvering v. Mitchell*,<sup>280</sup> in which it apparently assumed that a Revenue Act provision could trigger double jeopardy protection if it intended to punish.

Further, the *Kurth Ranch* Court reiterated that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."<sup>281</sup> The Court, however, stressed that neither a "high rate of taxation nor an obvious deterrent purpose" can automatically make a tax punitive.<sup>282</sup> The Court recognized that the tax before it had such punitive attributes: namely, that a large part of the assessment was more than eight times the drug's market value and that the legislature aimed to deter the possession of marijuana.<sup>283</sup>

For the Court, however, there were other features of the Act that really set the drug tax apart from most taxes. First, the imposition of the tax was based on the commission of a crime and, in fact, the Department exacts the tax "only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place."<sup>284</sup> In this vein, the Court distin-

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277. In re *Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 511 U.S. 767 (1993). The Ninth Circuit, understanding that the central inquiry under *Halper* was whether the imposed sanction was rationally related to damages that the government had actually suffered, deemed the Kurths entitled to an individual accounting to determine if the sanction constitutes an impermissible second punishment. Because, however, the State had refused to offer the requisite evidence, the Ninth Circuit found the tax to be unconstitutional *as applied to the Kurths*.

278. *Sorensen v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992).

279. *Kurth Ranch*, 511 U.S. at 578-79.

280. 303 U.S. 391 (1938). *Helvering* involved a Revenue Act provision which required the taxpayer to pay an additional 50% of the total amount of any deficiency due to a fraudulent intent to evade the tax. The Court found this tax was remedial, not punitive. *Id.* at 398-405. See *supra* notes 127-29, 137 and accompanying text.

281. *Kurth Ranch*, 511 U.S. at 779 (quoting *A. Mangano Co. v. Hamilton*, 292 U.S. 40, 46 (1934)).

282. *Id.*

283. *Id.*

284. *Id.* at 780.

guished taxes on illegal activities from "mixed motive taxes that governments impose to deter a disfavored activity and to raise money."<sup>285</sup> With respect to cigarette taxes, an example of the "mixed motive" genus, the Court explained:

[B]ecause the product's benefits—such as creating employment, satisfying consumer demand, and providing tax revenues—are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers and smokers pay high taxes that reduce consumption and increase government revenue.<sup>286</sup>

The Court pointed out that the justifications behind the "mixed motive" tax disappear when the law forbids the taxed activity altogether.<sup>287</sup> That is, "the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction."<sup>288</sup>

Second, the Drug Tax, which purports to be a property tax, had an anomalous attribute: that the state imposes it on goods that the taxpayer neither owns nor possesses. In fact, in the *Kurth Ranch* situation, the State destroyed the contraband before the assessment.<sup>289</sup> As the Court saw it, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."<sup>290</sup>

In concluding that the drug tax proceeding was the "functional equivalent of successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense,'" the Court deemed the *Halper* test for civil penalties to be inapplicable to tax statutes.<sup>291</sup> As the Court put it, "*Halper's* method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.'<sup>292</sup>

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285. *Id.* at 782.

286. *Id.*

287. *Id.*

288. *Id.* Further, the *Kurth Ranch* Court deemed it "significant that the same sovereign that criminalized the activity also imposed the tax." *Id.* at 782 n.22. The Court contrasted the situation before it with those cases, like *United States v. Constantine*, 296 U.S. 287 (1935), which involved taxes prohibited by other sovereigns, and said that *those* cases were ones "confirming that the unlawfulness of an activity does not prevent its taxation." *Kurth Ranch*, 511 U.S. at 782 n.22.

289. *Id.* at 781.

290. *Id.*

291. *Id.*

292. *Id.*

2. *The Dissenting Opinions.* Justice Scalia, with whom Justice Thomas joined, issued a dissenting opinion, which is especially significant because it criticized the Court's overall perspective on the Double Jeopardy Clause itself.<sup>293</sup> According to Justice Scalia, the Double Jeopardy Clause does not separately prohibit multiple punishments, but only multiple prosecutions.<sup>294</sup> Scalia essentially traced the supposed separate multiple punishment component to the decision in *Ex Parte Lange*.<sup>295</sup>

In *Lange*, after the defendant was convicted of stealing mail bags from the post office, the trial court sentenced him to prison and imposed a fine.<sup>296</sup> The Supreme Court, in issuing a writ of habeas corpus, deemed the sentence to be in excess of statutory authorization.<sup>297</sup> Although the *Lange* decision rested not exclusively on the Double Jeopardy Clause but also on common law and Due Process principles, later courts tended to cite *Lange* as a double jeopardy case.<sup>298</sup> What Scalia pointed out is that although the *Lange* progeny recited the dictum that "the Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same criminal offense,"<sup>299</sup> such "repetition . . . does not turn [such dictum] into a holding."<sup>300</sup> While Justice Scalia had admittedly joined the Court's unanimous decision in *Halper*, his difficulty in actually applying *Halper* to Montana's Drug Tax Act was what apparently caused him to doubt the very existence of a "multiple-punishments component."<sup>301</sup>

According to Justice Scalia, the Double Jeopardy Clause prohibits successive prosecution, not successive punishments.<sup>302</sup> Basically, "multiplicity *qua* multiplicity, however, is restricted only by the Double Jeopardy Clause's requirement that there be no successive criminal prosecution."<sup>303</sup> Otherwise, in Scalia's view, it is the Due Process Clause that "keeps punishment within the bounds established by the legislature and the Cruel

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293. *Id.* at 798 (Scalia, J., dissenting).

294. *Id.*

295. 85 U.S. (18 Wall.) 163 (1873).

296. *Kurth Ranch*, 511 U.S. at 799.

297. *Id.*

298. Justice Scalia cites *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) as an example of a case in which the Court treated *Lange* as if it were an exclusively double jeopardy case. *Kurth Ranch*, 511 U.S. at 799.

299. *Kurth Ranch*, 511 U.S. at 800.

300. *Id.*

301. *Id.* at 802-03.

302. *Id.* at 804-05.

303. *Id.* at 805.



and Unusual Punishments and Excessive Fines Clauses [that] place substantive limits upon what those legislated bounds may be."<sup>304</sup>

Scalia would thus conclude that Montana's tax proceeding does not constitute a second criminal prosecution. Also, because the Montana legislature authorized the imposition of the taxes on top of the criminal penalties, there was no Due Process violation.<sup>305</sup>

3. *The Real Effect of the Kurth Ranch Decision.* The *Kurth Ranch* decision impacts on *Halper* in at least two significant ways. First, it bolsters what was incipient in *Halper*, the concept of the related civil proceedings as separate from the companion criminal prosecution. In *Halper*, the Supreme Court clarified that its decision does not prevent the government from seeking a civil and criminal penalty in a "single proceeding."<sup>306</sup> Scrutinizing the procedural posture of the *Halper* case itself, of course, should dispel even a conjecture that a separate civil proceeding

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304. *Id.* at 803.

305. Chief Justice Rehnquist, also dissenting, agreed with the Court's rejection of the "*Halper* mode of analysis," which, in his opinion, "simply does not fit in the case of a tax statute." *Kurth Ranch*, 511 U.S. at 785. Unlike the penalty in *Halper*, which "enabled the Government to recover more than an approximation of its costs . . . the purpose of a tax statute is not [reimbursement for] costs . . . , but is instead to either raise revenue, deter conduct, or both." *Id.* at 786. Although Chief Justice Rehnquist did not disagree with the Court's conclusion that a tax could conceivably be punishment as it had similarly found in *United States v. Constantine*, 296 U.S. 287 (1935), he disagreed that the *Constantine* factors were present in the Montana Drug Tax situation:

I do not find the conditioning of the tax on criminal conduct and arrest to be fatal to this tax's validity; this characteristic simply reflects the reality of taxing an illegal enterprise. Furthermore, the rate of taxation clearly supports petitioners here . . . . First, unlike the situation in *Constantine*, no tax or fee is otherwise collected from individuals engaged in the illicit drug business. Thus, an entire business goes without taxation. Second, the Montana tax is not disproportionate as the additional excise tax in *Constantine*.

*Kurth Ranch*, 511 U.S. at 790. According to Rehnquist, the Court's conclusion was not only inconsistent with the purpose and effect of the Montana statute, but also with the Court's previous decisions. *Id.* at 791. Also, in his view, "[w]hen compared to similar types of 'sin' taxes on items such as alcohol and cigarettes, [Montana's] figures are not so high as to be deemed arbitrary or shocking." *Id.*

In a separate dissent, Justice O'Connor agreed with the Court "that Montana's drug tax is not exempt from scrutiny under the Double Jeopardy Clause," but disagreed with its conclusion that such a drug is always punitive. *Id.* at 793. Specifically, Justice O'Connor would remand the matter for further proceedings consistent with *Halper*. O'Connor stressed that the bifurcated approach in *Halper* is the correct one because it honors "[t]he presumption of constitutionality to which every state statute is entitled . . . ." *Id.* at 796.

306. *United States v. Halper*, 490 U.S. 435, 450 (1989).

is not *really* separate from the related criminal action. That is, in *Halper*, the government first charged Halper with violating the criminal false-claims statute and even obtained the conviction.<sup>307</sup> Afterwards, the government commenced the civil False Claims Act suit, which the *Halper* Court unequivocally viewed not only as a separate proceeding, but as one that potentially resulted in a second separate punishment.<sup>308</sup>

While there is hardly a basis for distinguishing the decidedly separate parallel proceedings in *Halper* from the normative procedural posture of civil in rem forfeiture actions that trail or precede criminal proceedings, the very language in *Kurth Ranch* should totally block any attempt to portray such separate actions as fused. In *Kurth Ranch*, the Court, albeit in dictum, said that the raid on the Kurth farm "gave rise to four *separate* legal proceedings," one of which was a civil forfeiture action to confiscate the cash and equipment used in the marijuana business.<sup>309</sup> Also, in what is definitely not dictum, the *Kurth Ranch* Court described the Montana Drug Tax proceeding as separate.<sup>310</sup> The Court, in fact, delineated one option Montana had but did *not* pursue as that of "assess[ing] the tax in the *same* proceeding that resulted in [the taxpayer's] conviction."<sup>311</sup>

Second, the language in the *Kurth Ranch* decision comes close to extinguishing the problems that the *Halper* Court spawned through its myopic fixation on the supposed separate multiple-punishments component of the Double Jeopardy Clause. As discussed above, the *Halper* Court formulated the issue as presenting an unadulterated "multiple punishments" problem and in so doing, left open an avenue for the government to seek a separate civil penalty against an already acquitted individual.<sup>312</sup> Consequently, although the *Halper* Court deemed the protection against "multiple punishments for the same offense" to be such a sacred aspect of the Double Jeopardy Clause,<sup>313</sup> it actually exiled that supposed aspect from the Clause's core—the protection of the individual's right to finality

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307. *Id.* at 435.

308. *Id.* at 449-51.

309. *Kurth Ranch*, 511 U.S. at 771-72 (emphasis added).

310. *Id.* at 772-73 (the Montana Drug Tax proceeding was one of the four "separate legal proceedings").

311. *Id.* at 778 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)) (emphasis added). See *supra* notes 52-54 and accompanying text.

312. *Halper*, 490 U.S. at 440-41. See also discussion *supra* Part IIA.2.

313. *Halper*, 490 U.S. at 447 (calling the protection of such "humane interests" an "intrinsically personal" one) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943)).

and the curtailing of inordinate prosecutorial overreaching.<sup>314</sup>

Although Justice Scalia appeared to object to what he faulted as the *Kurth Ranch* Court's adherence to the notion that "there is a multiple-punishments component to the Double Jeopardy Clause,"<sup>315</sup> his dissent and the Court's opinion do not greatly diverge on that particular issue. One of the things that Justice Scalia found problematic with a separate "no-double-punishments-rule" is that the "Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution* since the prosecution *itself* would be barred."<sup>316</sup> While the *Kurth Ranch* Court did indeed begin with that familiar incantation that the "Double Jeopardy Clause protects against multiple punishments for the same offense"<sup>317</sup> and even purported to hang its decision on that special separate hook, it implicitly recognized what Scalia indicated—that the Clause's preclusion of a second prosecution subsumes the multiple punishment ban. In fact, the Court stated point blank that "the *proceeding* Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal *prosecution* that placed the Kurths *in jeopardy* a second time for the same offence."<sup>318</sup> Such language, in fact, almost mirrors what Scalia posited as the "Clause's ban on successive prosecutions . . . mak[ing] surplusage of any distinct protection against additional punishment imposed in a successive prosecution."<sup>319</sup>

By automatically shifting its ken from the "multiple punishments" question to an apparent multiple prosecution retort, the *Kurth Ranch* Court had, in effect, begun to rehabilitate the Double Jeopardy Clause. That is, if the civil proceeding is indeed the "functional equivalent of a . . . criminal prosecution,"<sup>320</sup> then the government can not, by seeking to impose a civil penalty on an acquittee, harassingly subject such an individual to duplicate ordeals.<sup>321</sup> Because under the reasoning of *Kurth Ranch* a civil penalty "must be imposed during the first prosecution or not at all,"<sup>322</sup> the Clause does what it is designed to do—namely, accord the accused some meaningful closure.

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314. See discussion *supra* Part I.A.

315. *Kurth Ranch*, 511 U.S. at 798-99.

316. *Id.* at 801.

317. *Id.* at 769 n.1.

318. *Id.* at 784 (emphasis added).

319. *Id.* at 801.

320. *Id.* at 784.

321. See *supra* notes 56-67 and accompanying text and discussion *supra* Part II.A.2.

322. *Kurth Ranch*, 511 U.S. at 784.

### III. THE BIRTH OF NEW FORFEITURE MYTHS IN THE FEDERAL APPELLATE COURTS

Ironically, although the *Halper*, *Austin* and *Kurth Ranch* decisions should have ushered in an era of mythless civil in rem forfeiture with double jeopardy protection, several circuit courts created surrogate myths to fend off the necessary constitutional protection.

#### A. *The Myth of Non-Separation*

The Second,<sup>323</sup> Sixth<sup>324</sup> and Eleventh Circuits<sup>325</sup> concocted a way to avoid the application of double jeopardy by mythically portraying the separate civil and criminal proceedings as not necessarily separate. In essence, they strained to find that under certain circumstances, the parallel civil and criminal proceedings can somehow meld into a single prosecution.

1. *The Second Circuit's Approach: United States v. Millan.* In *Millan*, after the Drug Enforcement Administration investigated what it believed was an organization involved in the distribution of heroin, the United States magistrate issued arrest warrants for over forty individuals, including the Bottones.<sup>326</sup> On the same day, the magistrate issued seizure warrants for assets, which were alleged to be facilitators of or proceeds from the illegal activity.<sup>327</sup> Such assets included "Auction Cars," which was a used car business.<sup>328</sup>

About two weeks later, the government named the Bottones in an initial grand jury indictment, accusing them, among other things, of participation in a conspiracy to distribute "massive amounts of heroin."<sup>329</sup> That indictment also contained a criminal forfeiture count.<sup>330</sup> Shortly thereafter, the district court issued a post-indictment restraining order to prevent the Bottones

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323. *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). In *United States v. Smith*, 75 F.3d 382 (8th Cir. 1996), the Eighth Circuit followed the *Millan* court's approach.

324. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *rev'd* 116 S. Ct. 2135 (1996).

325. *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994).

326. *Millan*, 2 F.3d at 18.

327. *Id.* The seizure was pursuant to 21 U.S.C. § 881 (1994).

328. *Millan*, 2 F.3d at 18.

329. *Id.* The indictment accused them of violating 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846 (1988).

330. *Millan*, 2 F.3d at 18. The criminal forfeiture count was included pursuant to 21 U.S.C. § 853(a)(1) and (a)(2).

from transferring or dissipating the properties subject to criminal forfeiture.<sup>331</sup>

Subsequently, however, at a pretrial conference the Bottones represented that they lacked the funds to pay their attorneys.<sup>332</sup> Rather than moving to obtain the release of such funds for attorneys' fees, the Bottones embarked on settlement negotiations with respect to the assets involved in the civil seizure and the criminal restraining order.<sup>333</sup>

While such negotiations were underway, Alfred Bottone, Jr. filed an administrative claim to challenge the government's seizure of Auction Cars.<sup>334</sup> The government responded by lodging an in rem civil forfeiture complaint against those assets and by incorporating by reference the indictment into the complaint.<sup>335</sup> Only Alfred Bottone Jr. answered the complaint.<sup>336</sup>

Almost a year later, the grand jury issued a superseding indictment, which alleged in part that the Bottones and others had obtained property in excess of \$100 million from the narcotics activity.<sup>337</sup> The government not only charged the Bottones and others with joint and several liability for the forfeiture of the property, but also indicated that it intended to satisfy any forfeiture liability with the Bottones' "substitute property."<sup>338</sup> In so doing, the government disclosed its resolution to go after property that was not directly implicated in the narcotics conspiracy.

The Bottones eventually entered into a stipulation with the government.<sup>339</sup> Under the stipulation, the government agreed to release cash and other assets to the Bottones for their attorneys' fees.<sup>340</sup> The Bottones, in turn, agreed to forfeit other assets to the government and renounce any claim associated with certain other properties.<sup>341</sup> Under the stipulation, the government dis-

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331. *Millan*, 2 F.3d at 18. This was done pursuant to 21 U.S.C. § 853(e)(1)(A).

332. *Millan*, 2 F.3d at 18.

333. *Id.* at 18-19. Under *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), the Bottones could have sought a pretrial hearing to obtain the release of funds for attorneys' fees.

334. *Millan*, 2 F.3d at 19.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* The government aimed to do this pursuant to 21 U.S.C. § 853(p) "even though said property was not directly implicated in the narcotics conspiracy." *Id.*

339. *Id.*

340. *Id.*

341. *Id.* The forfeited properties included "\$236,804.48 in bank deposits, two parcels of real estate, and two business interests." *Id.*

missed the civil suit.<sup>342</sup>

Before the criminal trial commenced, the Bottones, relying on the Supreme Court's *Halper* decision, sought to dismiss the superseding indictment on double jeopardy grounds.<sup>343</sup> In denying the motion, the district court gave the following reasons:

(1) the civil and criminal prosecutions constitute a single proceeding; (2) the value of the seized property was not 'overwhelmingly disproportionate' to the value of the illegal narcotics giving rise to the criminal indictment; and (3) the defendants were estopped from making this assertion because they voluntarily entered in the stipulation.<sup>344</sup>

On appeal in the Second Circuit, the Bottones argued that the civil settlement acted as punishment under the Double Jeopardy Clause, which thus barred the criminal prosecution.<sup>345</sup> The Second Circuit, obviating the need to reach the punishment issue, concluded that the government's employment of a "single proceeding to prosecute the Bottones" did not trigger Double Jeopardy protection.<sup>346</sup>

The Second Circuit supposedly grabbed at the language in *Halper* that "the decision did not prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."<sup>347</sup> From there, the Second Circuit reasoned that the civil forfeiture action "was part of a single coordinated prosecution"<sup>348</sup> and elaborated:

In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the Bottones were aware of the criminal charges against them when they entered into the Stipulation.<sup>349</sup>

The court also rejected what the Bottones' had emphasized—namely, the government's separate filing of the civil and criminal actions and the fact that each action had its own

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342. *Id.* at 18.

343. *Id.* at 19.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 20 (citing *United States v. Halper*, 490 U.S. 435, 450 (1989)).

348. *Id.*

349. *Id.*

docket numbers.<sup>350</sup> The court, essentially relegated such details to the category of mere federal "procedure" and said that courts must instead "look past the procedural requirements and examine the essence of the actions at hand."<sup>351</sup> According to the Second Circuit, the analysis boiled down to "when, how and why the civil and criminal actions were initiated."<sup>352</sup> Under that supposed when-how-and-why-test, the Second Circuit concluded that the civil and criminal cases comprised a unitary action.<sup>353</sup>

The Second Circuit, moreover, acknowledged one of the *Halper* Court's concerns—that "the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action."<sup>354</sup> The Second Circuit, however, brushed that concern aside by depicting the situation before it as one involving "contemporaneous . . . and not consecutive" civil and criminal actions.<sup>355</sup> As such, the court decided that the situation before it simply did not implicate any constitutional provisions that would inhibit the government's use of "the full range of statutorily authorized penalties . . . ."<sup>356</sup>

2. *The Sixth Circuit's Approach: United States v. Ursery.* In *Ursery*, the police searched the Ursery home and seized 142 marijuana plants.<sup>357</sup> In the Ursery residence, the police found an ammunition case with two plastic bags filled with marijuana seeds, two loaded firearms, a box with ten plastic bags containing marijuana seeds, marijuana stems and stalks and a growlight.<sup>358</sup>

Subsequently, the government instituted a civil action against Ursery and his wife in which it sought forfeiture of the Ursery residence.<sup>359</sup> Ultimately, after the Urserys and the government entered into a settlement in which the Urserys agreed to pay the government \$13,250, the consent judgment issued and the Urserys paid the agreed amount.<sup>360</sup>

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350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* (citing *Halper*, 490 U.S. at 451 n.10).

355. *Id.*

356. *Id.* at 21.

357. *United States v. Ursery*, 59 F.3d 568, 570 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996).

358. *Id.*

359. *Id.* The government brought the action pursuant to 21 U.S.C. § 881(a)(7) (1994)).

360. *Ursery*, 59 F.3d at 570.

While the civil forfeiture action was pending, the government indicted Ursery for manufacture of marijuana.<sup>361</sup> After the jury returned a guilty verdict, Ursery filed post trial motions in which he sought a dismissal on double jeopardy grounds.<sup>362</sup> The district court rejected the double jeopardy argument and the Sixth Circuit entertained de novo review of the issue.<sup>363</sup>

Before immersing itself in the double jeopardy analysis, the Sixth Circuit expressed its disagreement with the district court's conclusion that the consent judgment or settlement of the forfeiture action precluded double jeopardy protection.<sup>364</sup> Specifically, the Sixth Circuit analogized the consent judgment to a guilty plea in a criminal case and relied on the basic principle that "jeopardy attaches to a guilty plea pursuant to a plea agreement upon the court's acceptance of the plea agreement."<sup>365</sup>

After concluding that "jeopardy attached when the forfeiture judgment was entered against Ursery," the Sixth Circuit embarked on a tripartite inquiry, which began with the question of whether the civil forfeiture in the case constitutes "punishment."<sup>366</sup> The court's affirmative answer derived from its interpretation of *Halper* plus *Austin*, which, according to the Sixth Circuit, equated "any civil forfeiture under [§] 21 U.S.C.

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361. *Id.* The manufacture of marijuana was alleged to be a violation of 21 U.S.C. § 841(a)(1).

362. *Ursery*, 59 F.3d at 570.

363. *Id.*

364. *Id.* at 571. The *Ursery* Court also rejected the government's contention that Ursery had waived his double jeopardy claim by failing to raise it prior to trial in compliance with the Federal Rule of Criminal Procedure 12(b)(1). *Id.* Since the district court had deemed Ursery's double jeopardy argument was not waived, the court concluded that it could review the issue as one passed upon below. *Id.* It also found that Ursery had shown cause for not raising the double jeopardy issue prior to trial because the *Austin* decision, which clarified its position, was decided a mere two days before the commencement of Ursery's trial. *Id.*

365. *Id.* at 572. The court elaborated as follows:

The fact that there has been no trial in which a jury is sworn or the court hears evidence does not preclude jeopardy from attaching to a plea entered pursuant to a plea agreement. Similarly, the fact that there has been no trial in a civil forfeiture proceeding does not preclude the attachment of jeopardy to a forfeiture judgment. Jeopardy attaches in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture and enters the judgment of forfeiture.

*Id.* See *infra* note 548 and accompanying text. The *Ursery* court also distinguished the case before it from *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994) in which the "party claiming double jeopardy was not a party to the forfeiture proceeding, and thus was never at risk of having a forfeiture judgment entered against him." *Ursery*, 59 F.3d at 572. See also discussion *infra* Part IV.A.2.

366. *Ursery*, 59 F.3d at 572.



881(a)(7) [with] punishment for double jeopardy purposes."<sup>367</sup>

Second, the Sixth Circuit considered whether the civil forfeiture and criminal conviction constituted punishment for the same offense and turned to the seminal *Blockburger* test.<sup>368</sup> In that regard, the government, in what was really an attempt to resuscitate the guilty property forfeiture fiction,<sup>369</sup> argued that because the "criminal prosecution requires proof that a *person*, the defendant, committed the crime, while the forfeiture requires proof that the *property* subject to forfeiture has been involved in the commission of a criminal violation[,] . . . each offense requires an element that the other does not."<sup>370</sup> In rejecting the fiction, the court, emphasizing that the "forfeiture necessarily requires proof of the criminal offense," said:

Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery's residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action.<sup>371</sup>

Third, the court considered what it viewed as a pivotal question after *Halper*—whether the civil forfeiture and criminal prosecution were really separate. Although viewing the parallel proceedings before it as separate, the Sixth Circuit expressly rejected the Ninth Circuit decision "that parallel civil forfeiture and criminal proceedings will *always* violate the Double Jeopardy Clause" and instead subscribed to an ad hoc assessment of separateness:

[W]e also find it unnecessary to fully adopt the Ninth Circuit's view in this case. It is merely our view that in so far as the existence of a 'single, coordinated proceeding' could arguably satisfy the requirements of the Double Jeopardy Clause, as suggested by the Second and Eleventh Circuits, the facts in this case fail to reveal a single coordinated proceeding.<sup>372</sup>

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367. *Id.* at 573 (emphasis added).

368. *Id.* (citing *Blockburger v. United States*, 284 U.S. 299 (1932) and *United States v. Dixon*, 113 S. Ct. 2849 (1993)). See also discussion *infra* Part IV.C.

369. See discussion *infra* Part IV.C.

370. *Ursery*, 59 F.3d at 573.

371. *Id.* at 574.

372. *Id.* at 575 (emphasis added). See also discussion of Ninth Circuit decision, *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S. Ct. 762 (1996), *rev'd*, 116 S. Ct. 2135 (1996), *infra* Parts IV.A.1 and IV.B.

The court believed that there was no indication in the record before it that the government intended to treat the civil forfeiture and criminal prosecution as one proceeding.<sup>373</sup> Specifically, as the court deemed crucial, there was no communicative bridge between the government attorneys who handled the forfeiture action and those prosecuting the criminal case.<sup>374</sup> Also, as the court said, "[t]he civil forfeiture proceeding and the criminal proceeding were instituted four months apart, presided over by different district judges and resolved by separate judgments."<sup>375</sup>

Further, the Sixth Circuit scrutinized the actual procedural posture in *Millan* upon which the Second Circuit based its conclusion that the civil forfeiture suit and the criminal prosecution constituted a single proceeding.<sup>376</sup> As the *Ursery* Court saw it, the only common denominator between the situation before it and the one in *Millan* was the defendants' awareness of the criminal charges against them at the time they settled the forfeiture matter.<sup>377</sup>

Also, in *Ursery* the government tried to use the Eleventh Circuit case, *18755 N. Bay Rd.*, to bolster its theory that the civil and criminal proceedings should be treated as "single" even though they began and ended on different dates.<sup>378</sup> The Sixth Circuit, however, rejected that contention without discussion. When the government in *Ursery* likewise sought to avail itself of the rationale, that "[a]s in *Millan*, there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action[.]" the Sixth Circuit in a similarly succinct manner branded that putative abuse factor as not "dispositive."<sup>379</sup>

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373. *Ursery*, 59 F.3d at 575.

374. *Id.*

375. *Id.*

376. *Id.* at 574-75.

377. *Id.*

378. *Id.*

379. *Id.* Judge Milburn, dissenting, believed that the case "involve[d] a sufficiently coordinated proceeding to fall under the holdings in *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993) and *United States v. One Single Family Residence Located at 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994)" because "it [did] not present the potential for government abuse of process." *Id.* at 577-78. Judge Milburn also expressed the view that *Millan* and *18755 N. Bay Rd.* were still good law after the subsequent decision in *Kurth Ranch*, which "dealt . . . exclusively with the tax assessment." *Id.* at 578. Further, Judge Milburn disagreed with the court's conclusion that the civil forfeiture action and the defendant's criminal prosecution were based on the same offense because "the criminal indictment charged defendant only with the manufacture of a controlled substance during [one year]" and the civil forfeiture action "relat[ed] solely to processing and distribu-

3. *The Eleventh Circuit's Approach: United States v. 18755 N. Bay Rd.* In *18755 N. Bay Rd.*, the forfeiture action arose out of the government's investigation of alleged gambling at the Delio home.<sup>380</sup> Pursuant to a search warrant, the government seized gambling records, poker tables, poker chips, decks of cards and cash.<sup>381</sup> The government eventually indicted not just Emilio Delio, but other individuals who apparently served as operators, card dealers, cashiers and bookkeepers for the game.<sup>382</sup> The government, however, did not indict Yolanda Delio and her daughter, Maria, although both women allegedly cooked and served food to the clientele.<sup>383</sup>

Emilio and Yolanda Delio, who owned the property as tenants by the entireties, answered the government's forfeiture complaint.<sup>384</sup> They denied that the property was used for a gambling business<sup>385</sup> and Yolanda Delio also lodged an "innocent owner" defense, an issue which she later abandoned on appeal.<sup>386</sup>

The trial court denied the government's initial motion for summary judgment.<sup>387</sup> But then after Emilio Delio was convicted of all counts of conducting an illegal gambling operation, the government renewed its summary judgment motion.<sup>388</sup> The second motion, relying on the conviction for the issue of probable cause, based itself on the identical record upon which the trial court had denied the original motion.<sup>389</sup> The United States magistrate granted summary judgment in favor of the government and the district court ordered forfeiture of the real property.<sup>390</sup>

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tion activities in [other] years . . . " *Id.* at 579.

380. *18755 N. Bay Rd.*, 13 F.3d at 1495.

381. *Id.* at 1494.

382. *Id.*

383. *Id.*

384. *Id.* at 1494-95.

385. *Id.* at 1495 n.1. Gambling business is defined in 18 U.S.C. § 1955(b) (1994) as follows:

(1) 'illegal gambling business' means a gambling business which—(i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

386. *18755 N. Bay Rd.*, 13 F.3d at 1495. See discussion *supra* notes 121-23 and accompanying text.

387. *18755 N. Bay Rd.*, 13 F.3d at 1495.

388. *Id.*

389. *Id.*

390. *Id.*

On appeal in the Eleventh Circuit, Emilio Delio alone argued that his being subjected to two punishments for the same gambling offense violated the Double Jeopardy Clause.<sup>391</sup> Although Delio relied on both the *Halper* and *Austin* decisions, the Eleventh Circuit locked onto the language in *Halper* that the decision does not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."<sup>392</sup>

In rejecting Delio's position, the Eleventh Circuit simply concluded that the government's "simultaneous pursuit . . . of criminal and civil sanctions . . . falls within the contours of a single, coordinated prosecution."<sup>393</sup> In so doing, the court aligned itself with the Second Circuit's decision in *Millan* and said that with respect to the Delios, the government did not "act[] abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action."<sup>394</sup> Also, the Eleventh Circuit interpreted the test in *Halper* to be whether the legislature actually authorized cumulative punishment for a single course of conduct.<sup>395</sup>

4. *The Myth of Non-Separation.* The Second, Sixth and Eleventh Circuits basically inaugurated the mythic notion that separate parallel civil in rem forfeiture actions and criminal prosecutions can be treated as a fused amalgam.<sup>396</sup>

In *Millan*, the Second Circuit impliedly created a multi-

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391. *Id.* On appeal, Yolanda Delio also argued that the trial court erred in applying collateral estoppel and that there existed disputed factual issues to overcome the granting of the government's motion for summary judgment. *Id.* The Eleventh Circuit agreed and "h[eld] that Mrs. Delio [was] not bound by the factual determinations made in connection with her husband's criminal trial." *Id.* at 1496. The court pointed out, moreover, that even the concept that the *property* is the guilty party does not "deny the rights of a claimant who seeks to introduce evidence of disputed facts," *id.*, and concluded that the district court erroneously "foreclosed Yolanda Delio's opportunity to present her position that the poker game at her home did not possess the attributes of a well-established, well-organized, large scale gambling operation." *Id.* at 1497. The other appellants argued violations of the state constitutional protection of the Florida homestead provision and the federal protection against excessive fines under the Eighth Amendment. *Id.* at 1495. Although the Eleventh Circuit rejected the first point and found that the forfeiture action preempted the Florida homestead law, it agreed with the second and concluded that "the forfeiture of [the] home, of an arguable value of \$150,000, [was] an imposition of a disproportionate penalty." *Id.* at 1498.

392. *Id.* at 1499 (quoting *United States v. Halper*, 490 U.S. 435, 450 (1989)).

393. *Id.*

394. *Id.*

395. *Id.*

396. In *United States v. Smith*, 75 F.3d 382 (8th Cir. 1996), the Eighth Circuit aligned itself with this approach.

factor test.<sup>397</sup> What the court indicated was that the parallel proceedings would be considered single where the same judge issues warrants for the civil seizures and criminal arrests on the same day and where such issuance is based on the same DEA agent affidavit. Also, where the civil complaint incorporates the criminal indictment and where the property owners are aware of the criminal charges against them when they resolve the forfeiture matter, "the civil and criminal actions will be treated as different prongs of a single prosecution."<sup>398</sup> Further, under *Millan*, it will help the government defeat a double jeopardy challenge where the forfeiture stipulation deals with not just the seized properties in the civil suit, but also with those enumerated in the criminal indictment.<sup>399</sup>

Perplexingly, the *Millan* court said that the factor that the civil and criminal actions were filed separately with each having its own separate docket number did not make the actions separate. To the Second Circuit, the separate filing and docket numbers amounted to mere procedural niceties, which the court stamped "irrelevant."<sup>400</sup> In so doing, the court confounded logic. That is, what *does* make sense is conversely the conclusion that the required separate filing and separate docket numbers constitute not a "technicality,"<sup>401</sup> but instead an implicit procedural definition of the civil and criminal actions as being indeed separate.

Also, the *Millan* decision sits upon two arbitrary procedural categories: those that matter and those that don't. While the requisites of separate filing and separate docketing are classified

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397. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993).

398. *Id.* The Tenth Circuit, criticizing *Millan*, noted that "the authority for *Millan's* distinction between 'proceeding' and 'prosecution' consists entirely of one sentence from *Ohio v. Johnson*, 467 U.S. 493 (1984)" and that "*Johnson* did not involve multiple proceedings." *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1487 (10th Cir. 1996). The Tenth Circuit thus concluded that "*Johnson* is a very thin reed on which to perch the proposition that a single 'prosecution' may comprise multiple proceedings without violating double jeopardy." *Id.*

399. *Millan*, 2 F.3d at 20. In *United States v. Smith*, 75 F.3d at 386, the court opined that a "single coordinated prosecution . . . does not require that the government provide cross-references between the indictment and the civil complaint, or that the same judge preside over both cases, or that there should be a common judgment." Instead, according to the Eighth Circuit, the inquiry rests on "some common-sense questions: whether the government initiated its parallel actions at, or very close to, the same time, and whether there is some evidence of coordination of the two matters that connects them in an obvious way." *Id.* The court found that the cases before it met the definition of a "single coordinated prosecution." *Id.*

400. *Smith*, 75 F.3d at 384.

401. *Id.* at 385.

as somehow irrelevant, other procedural aspects—such as the same judge's contemporaneous issuance of the arrest and seizure warrants and the fact that there is one supporting DEA agent affidavit—are forced into the determinative class. Such a division, however, is transparently absurd. In fact, if the Second Circuit had truly believed what it said—that a gauging of whether the actions are single or separate entails an examination of their “essence” and a determination of “when, how and why the civil and criminal actions [are] initiated”<sup>402</sup>—then surely *all* factors would be welcomed into the calculus.

Also, the Second Circuit apparently founded its conclusion that the forfeiture and the prosecution were prongs of a unitary proceeding on its view of the issuance of the warrants “as part of a coordinated effort to put an end to an extensive narcotics conspiracy.”<sup>403</sup> The fact that this can be quoted as the purple passage in the *Millan* decision is unfortunate because almost *any* parallel civil forfeiture suit and criminal prosecution constitute a unit. That is because most arrests that give rise to both civil forfeiture and criminal proceedings can be depicted as some “coordinated effort to put an end to . . . [some] extensive . . . conspiracy.”<sup>404</sup>

Further, in *Millan*, the Second Circuit harped on the *Halper* concern that “the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action.”<sup>405</sup> The Second Circuit, however, expressed the view that the situation before it did not present such a danger of prosecutorial abuse because the civil and criminal cases “were contemporaneous and not consecutive.”<sup>406</sup>

The *Millan* reasoning is problematic not just because it propels us into a silly circularity, but also because of the court's ostensible view of commencement as interchangeable with disposition. After all, one avenue that the *Halper* Court at least encouraged was joinder. According to the *Halper* Court, when the government seeks and obtains the full civil and criminal penalties in the same proceeding, it can be ensured that the to-

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402. *Id.*

403. *Millan*, 2 F.3d at 19.

404. *Id.* The Eighth Circuit test in *Smith*, 75 F.3d at 386, is similarly broad. That is, all that needs to be shown is that “the government initiated its parallel actions at, or very close to, the same time, . . . and [that] there is *some* evidence of coordination of the two matters that connects them in an obvious way.” *Id.* (emphasis added).

405. *Millan*, 2 F.3d at 20 (citing *United States v. Halper*, 490 U.S. 435, 451 n.10 (1989)).

406. *Id.*

tal punishment is statutorily authorized.<sup>407</sup> This putative safeguard exists not because of the contemporaneous *commencement* of the supposed civil and criminal "prongs," but really because of their contemporaneous *disposition*. Theoretically, the conterminous issuance of the civil and criminal penalties enables courts to see and evaluate the punishment as a conglomerate. Consequently, what the *Millan* court felt was so important—that the parallel actions started at the same time—does not, of course, guarantee the occurrence of what might *really* be important—the simultaneous *disposition*, which the *Halper* Court elevated to a protective measure. Also, obviously the fact that the cases start at the same time does not alleviate what the *Halper* Court feared—that the government would seek a second punishment out of dissatisfaction with the first.<sup>408</sup>

The Second Circuit additionally found something in the record that it believed exonerated the government of an abuse accusation. The court somehow intuited from the record that "the government intended to pursue all available civil and criminal remedies, regardless of the individual outcome of any of these claims."<sup>409</sup> All the record in *Millan*, however, *could* have revealed was that the same judge issued the warrants for the civil seizures and criminal arrests on the same day and based them on the same DEA agent affidavit. The facts surrounding the cases' inceptions do not and can not disclose the government's *intended* strategy or provide an assurance the government will not obtain a stay of or even decline to pursue one of the two actions. Thus, the *Millan* record, no more than probably almost *any* record, revealed a governmental intent to "pursue all available civil and criminal remedies."<sup>410</sup>

Basically, if the civil and criminal actions in *Millan* could be treated as unitary compatriots, then almost any situation in which there is both a civil forfeiture and a criminal prosecution can pass the test. In fact, the Eleventh Circuit's approach in *18755 N. Bay Rd.* makes this hypothesis into a caricatured reality.

In *18755 N. Bay Rd.*, there was not even a simultaneous commencement. The government instituted the in rem civil forfeiture in October of 1990 and issued the indictment in March of

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407. *Halper*, 490 U.S. at 450.

408. *Id.* at 451 n.10.

409. *Millan*, 2 F.3d at 20-21.

410. *Id.* at 21. Cf. *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1488 (10th Cir. 1996) ("[T]he government's good faith does not make two proceedings a single jeopardy").

1991.<sup>411</sup> Two months after the defendant was convicted in October of 1991, the government renewed its motion for summary judgment in the civil suit, which the district court granted.<sup>412</sup> The Eleventh Circuit glibly recited that the circumstances before it presented one of "simultaneous pursuit by the government of criminal and civil sanctions . . . [and as] fall[ing] within the contours of a single, coordinated prosecution."<sup>413</sup> But really the only thing in *18755 N. Bay Rd.* that can fairly be considered "single" and "coordinated" is the government's investigation of the poker games, which gave rise to both cases. After that investigation, each action went its own merry way.

As such, we can fairly read *18755 N. Bay Rd.* as standing for the proposition that when the civil forfeiture and criminal prosecution arise out of one investigation, then both actions will be deemed "single" and "coordinated." Such a holding, of course, has to kill off just about every double jeopardy defense in such situations where defendants face parallel civil forfeiture and criminal proceedings.<sup>414</sup> Consequently, the Eleventh Circuit reasoning defied what had to be the combined impact of the Supreme Court's *Halper* and *Austin* decisions.<sup>415</sup>

The decision in *18755 N. Bay Rd.* is problematic in still another way—namely, its purported emphasis on the absence of governmental abuse as a weighty factor. The Eleventh Circuit said that "[a]s in *Millan*, . . . there was no problem . . . that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action."<sup>416</sup> If, however, we understand the mandate of *Halper* plus *Austin* to the government when it wishes to seek *both* forfeiture and a conviction as one of inclusion of the forfeiture in the criminal proceeding itself, then the Eleventh Circuit effectually suborned disrespect for binding precedent.

The combined effect of *Halper* plus *Austin* is a joinder requirement and what implicitly underlies it is the association between governmental abuse and the very tactic of staggering the

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411. United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1494 (11th Cir. 1994).

412. *Id.* at 1495.

413. *Id.* at 1499.

414. Cf. Ellen S. Zimiles, *Do Halper And Austin Put Civil Forfeiture In Double Jeopardy?* 39 N.Y.L. SCH. L. REV. 189, 197 (1994) ("Such holdings [*18755 N. Bay Rd.* and *Millan*] demonstrate appreciation by the courts of Congress' intent to give the government an arsenal of weapons to combat certain crimes.").

415. The *Kurth Ranch* decision postdated the Eleventh Circuit decision and constitutes an arguable overruling of both *Millan* and *18755 N. Bay Rd.* But see United States v. Smith, 75 F.3d 382 (8th Cir. 1995) (rejecting that view).

416. *18755 N. Bay Rd.*, 13 F.3d at 1499.



separate criminal and civil proceedings.<sup>417</sup> By way of example, if the government proceeds with the civil forfeiture action after the criminal conviction, the government has, by facilitating the possibility of a swift forfeiture summary judgment, gained an advantage. If, however, the government pursues the forfeiture after an acquittal, it has also advantageously given itself a second chance to punish the accused. Also, putting the forfeiture first enables the government to use the criminal prosecution as Damoclean sword to prod claimants into relinquishing their property.<sup>418</sup> What the *Halper* decision in conjunction with *Austin* accomplished, however, was the recasting of such advantageous governmental positioning as not a mere euphemistic "strategy," but as an outright "abuse," one which "heightens rather than diminishes the concern that the government is forcing an individual to 'run the gauntlet' more than once."<sup>419</sup>

Although in *Ursery*, the Sixth Circuit reached the right bottom-line conclusion that the civil forfeiture proceeding and the criminal prosecution before it were separate, the route to that distinction is just as tortured as the ones in *Millan* and *18755 N. Bay Rd.* In the course of approving the "Second and Eleventh Circuit's efforts to consider the parallel proceedings as one prosecution,"<sup>420</sup> the *Ursery* court, in effect, published a recipe for the government to follow in order to circumvent the double jeopardy rule.

According to the *Ursery* recipe, the government should at least try to mimic the *Millan* posture by using one affidavit to get the same judge to issue warrants for the civil seizures and criminal arrests on the same day.<sup>421</sup> Also, as the *Ursery* court saw it, the government should make sure that the individual is aware of the criminal charges.<sup>422</sup> Further, the government

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417. See generally *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1211, 1216-17 (9th Cir. 1994) and discussion *infra* Part IV.

418. See Cheh, *supra* note 9, at 3 ("The property owner 'faces pressure—and the greater the value of the property, the greater the pressure—to sacrifice the property in return for a 'deal' with prosecutors to avoid criminal charges") (footnotes omitted).

419. *\$405,089.23 U.S. Currency*, 33 F.3d at 1217 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)). See also *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1488 (10th Cir. 1996) ("The practice of instituting multiple proceedings against a single defendant, which the government benignly terms a 'coordinated law-enforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him.").

420. *United States v. Ursery*, 59 F.3d 568, 575 (6th Cir. 1995), *rev'd* 116 S. Ct. 2135 (1996).

421. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993). See also *Ursery*, 59 F.3d at 574 (quoting *Millan* with approval).

422. *Millan*, 2 F.3d at 20. See also *Ursery*, 59 F.3d at 574-75 (quoting *Millan* with

should actually incorporate the criminal indictment into the civil complaint and in the event of a forfeiture stipulation, should make sure that "it involves not only the seized properties of the civil suit, but also properties named in the indictment."<sup>423</sup> In addition to the *Millan* ingredients, the court in *Ursery* sprinkled in a few of its own by suggesting that parallel proceedings will be more amenable to treatment as single and coordinated where the government prosecutors communicate with the government attorneys handling the civil forfeiture action.<sup>424</sup> In sum, such a strategy, best encapsulated by the buzz words of "simultaneity, incorporation and communication," became after *Ursery* a new manipulative prosecutorial *modus operandi*, which could enable the government to have a second bite when it finds the first to be unsavory.

In *Ursery*, the government, trying to defend itself with what the Eleventh Circuit stressed as a deciding factor, argued that it was not abusing the process by seeking a second punishment out of dissatisfaction with the first. The Sixth Circuit, however, did more than impliedly condone what is, in truth, a form of governmental abuse, but even handed the government the winning formula for abusing the accused without running awry of the Constitution.

In creating a forfeiture myth of non-separation out of the ashes of the old myths, the Second, Eleventh and Sixth Circuits hatched a harpy to menace not only the accused, but the district courts under their aegis.<sup>425</sup> The effect of these decisions was to force such federal trial courts to blindly acquiesce in the fictive welding together of two separate proceedings, and in that process ignore the separate docket numbers and the separate dispositions. Also, adhering to the new myths had to have been especially unsettling in light of the inconsistency between that approach and the *Halper* and *Kurth Ranch* decisions.<sup>426</sup>

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approval).

423. *Millan*, 2 F.3d at 20. See also *Ursery*, 59 F.3d at 574 (quoting *Millan* with approval). In *United States v. Smith*, 75 F.3d 382, 386 (8th Cir. 1996), although the Eighth Circuit said that [a] single, coordinated prosecution . . . does not require that the government provide cross-references between the indictment and the civil complaint . . ., it indeed considered the fact that "the affidavit attached to the civil forfeiture complaint [at issue] made reference to the incidents for which [the claimant] was indicted."

424. *Ursery*, 59 F.3d at 575.

425. See, e.g., *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 972 (S.D. Fla. 1994) (despite the logic of the Ninth Circuit in \$405,089.23 *U.S. Currency*, the court felt bound by the Eleventh Circuit's decision).

426. See generally *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994); *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1487 (10th Cir.

As discussed above, in *Halper*, there were unquestionably two parallel criminal and civil suits. After the defendant was sentenced to prison and fined in the criminal action, the district court entered summary judgment in the government's favor in the civil case.<sup>427</sup> There, of course, should be no doubt that the *Halper* Court viewed the criminal and civil cases as separate. In describing what the government conceded, the *Halper* Court emphasized that "*Halper already* has been punished as a result of his *prior* criminal proceeding," and "that the instant proceeding and the prior proceeding concern the same conduct."<sup>428</sup> Further, when the *Halper* Court delineated the choices left open to the government, the Court characterized the parallel civil and criminal actions before it as falling squarely into the separate—and *not* single—configuration. That is, the case before it was *the one* in which the government "impose[d] a criminal penalty upon [a defendant] . . . and then . . . [brought] a *separate* civil action based on the same conduct."<sup>429</sup> In fact, the reason the Court remanded the case was because it epitomized that separate proceedings' posture, the one which obligated the government to account for its actual costs arising from the wrongful conduct.

It should be somewhat significant that of the three initial federal appellate courts to address the "single coordinated prosecution" issue, only the Sixth Circuit had the benefit of the *Kurth Ranch* decision.<sup>430</sup> The Sixth Circuit, in fact, delved into *Kurth Ranch* and said that *Kurth Ranch* justified its own conclusion that the "civil forfeiture proceeding and the criminal prosecution [in the case before it] were two separate proceedings for purposes of double jeopardy."<sup>431</sup> Although the *Kurth Ranch* decision comported with what the *Urser* Court actually decided, it was diametrically opposed to the *Urser* court's rejection of a *per se* separate proceedings' approach.<sup>432</sup> In fact, if we look at it with

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1996); McClain, *supra* note 119, at 960-63 (discussing the Second and Eleventh Circuits' contravention of controlling precedent).

427. United States v. Halper, 490 U.S. 435, 438 (1989).

428. *Id.* at 441 (emphasis added).

429. *Id.* at 451 (emphasis added).

430. *But see Urser*, 59 F.3d at 578 (Milburn, J., dissenting) (asserting that *Kurth Ranch* would not necessarily change the results in *Millan* and *18755 N. Bay Rd.*). Accord United States v. Smith, 75 F.3d 382, 385 (8th Cir. 1996).

431. *Urser*, 59 F.3d at 576 n.6.

432. See generally McClain, *supra* note 119, at 960-63 (discussing how "viewing civil and criminal proceedings as a single proceeding" does not comport with *Kurth Ranch*). McClain also suggests that "[s]ection 881 itself implies that civil forfeiture is independent of criminal prosecution by providing that the 'filing of an indictment or information alleging a (criminal) violation . . . related to a civil forfeiture proceeding . . . shall, upon motion . . . stay the civil forfeiture proceeding.'" *Id.* at 959 (quoting 21 U.S.C. § 881(i)

real honesty, we should say that *Kurth Ranch* overruled *Ursery*, *Millan* and *18755 N. Bay Rd.*<sup>433</sup>

As discussed above, in *Kurth Ranch*, the Kurths pleaded guilty to the drug charges and had sentences imposed. After that, in a separate proceeding, the state revenue department sought to collect the tax imposed on the possession and storage of the drugs.<sup>434</sup> The Supreme Court made it crystal clear that it viewed this parallel civil proceeding as separate from the criminal case. Also, there is dictum in *Kurth Ranch* in which the Court explained that the raid on the family farm "gave rise to four separate legal proceedings" and that the forfeiture suit was one such separate proceeding.<sup>435</sup>

Even more broadly, the *Kurth Ranch* Court clarified that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offenses, or, indeed, if it assessed the tax in the *same proceeding* that resulted in his conviction."<sup>436</sup> What that language indicates is that the Court equated the separateness of the cases with the fact that the penalties issue separately.

Definitely, the procedural postures in *Millan* and *18755 N. Bay Rd.* fit the *Kurth Ranch* Court's conception of what amounts to separation. Although in *Millan* the same judge issued warrants for the civil seizures and criminal arrests on the same day, the actions were filed separately with their own docket numbers and each moved along on its own time track.<sup>437</sup> In January of 1993, the *Millan* defendants entered into a stipulation which resulted in a forfeiture of certain properties and a dismissal of the civil suit.<sup>438</sup> The criminal trial, however, was to commence more than a month after the disposition of the civil action.<sup>439</sup> As such, in *Millan* there surely was not what *Kurth Ranch* appears to require—that the civil penalty be imposed in the same proceeding that results in the conviction.

In *18755 N. Bay Rd.*, the civil and criminal suits were *exaggeratedly* asunder. In that case, the criminal proceeding was over and done when the government used the conviction to sum-

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(1994)).

433. *But see Ursery*, 59 F.3d at 578 (Milburn, J., dissenting).

434. *Kurth Ranch*, 511 U.S. at 773.

435. *Id.* at 771-72.

436. *Id.* at 778 (emphasis added).

437. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993).

438. *Id.* at 18.

439. *Id.* at 19 ("On February 23, 1993, before the start of the criminal trial, the Bottones filed a motion to dismiss the superseding indictment . . .").

marily dispose of the civil forfeiture suit.<sup>440</sup> Again, such a procedural posture, consisting of in tandem proceedings, is *not* the simultaneous disposition that *Kurth Ranch* requires.

Not only, however, did the myth of non-separation contravene *Halper* and *Kurth Ranch* and demand what the dissent in *Ursery* proclaimed was an "inevitabl[y] difficult[] . . . case-by-case comparison,"<sup>441</sup> but it was also inimical to the core of double jeopardy protection—namely, the safeguarding of the defendant's right to finality.<sup>442</sup> Such an ad hoc approach can force a defendant, who has already been hit with one penalty at the end of one ordeal, to endure still another ordeal and then consequently another punishment.

### B. *The Myth of Non-Punishment*

The Fifth Circuit created a second myth that not *all* civil forfeiture is punitive.<sup>443</sup>

1. *The Fifth Circuit Approach: United States v. Tilley*. In *Tilley*, there was a complaint for civil forfeiture *in rem* against certain personal and real property pursuant to 21 U.S.C. §§ 881(a)(6) and 881(a)(7).<sup>444</sup> Later, the government charged the defendants with various drug crimes. Because four of the defendants had entered into a stipulated forfeiture agreement with the United States, the district court entered a final judgment of

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440. *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1495 (11th Cir. 1993).

441. *Ursery*, 59 F.3d at 577.

442. See generally *supra* Part I.A.

443. The Third and Sixth and Seventh Circuits have followed the Fifth Circuit decision in *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 573 (1994), that forfeiture of drug proceeds under 21 U.S.C. § 881(a)(6) is not punishment. *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); *Smith v. United States*, 76 F.3d 879 (7th Cir. 1996).

In *Salinas*, Judge Wellford's concurrence suggested that the decision might present some practical problems in light of the Court's prior *Ursery* decision:

In [*Ursery*] . . . we held that the forfeiture of property used to facilitate the drug trade under 21 U.S.C. § 881(a)(7) was punishment within the meaning of the Double Jeopardy Clause. Therefore, if the government had sought forfeiture of *Salinas*' automobile on the grounds that he used the car to carry narcotics from Texas to Michigan, *Ursery* might have barred this criminal prosecution. Thus, after *Ursery* and our decision today, double jeopardy protection will often depend on which theory the government utilizes to justify the civil forfeiture.

*Salinas*, 65 F.3d at 554.

444. *Tilley*, 18 F.3d at 297.

forfeiture with respect to the personal property.<sup>445</sup> The district court, however, stayed the forfeiture proceedings with respect to two homes pending the outcome of the criminal trial.<sup>446</sup> Subsequently, the district court denied the defendants' motion to dismiss the indictment on the basis of double jeopardy and the defendants appealed.<sup>447</sup>

The Fifth Circuit saw the case as hinging almost entirely upon whether the prior civil forfeiture proceeding imposed punishment. After explaining that the *Halper* method "focuses on the relationship between the amount of the civil sanction and the amount required to serve the remedial purpose of reimbursing the costs incurred by the government and society as a result of the wrongful conduct," the court attempted to contrast the proceeds forfeiture in the case before it from the fine imposed in *Halper*.<sup>448</sup> First, the *Tilley* court said that the forfeiture at issue was "not so excessive as to render the relationship between the amount of the forfeiture and the resulting costs to the government and society irrational."<sup>449</sup> Second, the court stressed that the *Halper* case did not involve crime proceeds.<sup>450</sup>

In treating drug proceeds forfeiture as unique, the Fifth Circuit found sources approximating the revenue from illegal drug sales at \$80 to \$100 billion per year.<sup>451</sup> The costs to the government and society, however, were about \$60 to \$120 billion per year.<sup>452</sup> From there, the court concluded that the proceeds and costs on a national level were not "overwhelmingly disproportionate."<sup>453</sup> After reviewing the national statistics, the court simply opined that there was also a "rough proportionality" between the sanction and the governmental and societal costs in the actual case before it.<sup>454</sup> In fact, the court expressed the view that a forfeiture of even all of the drug sales proceeds would not be excessive.<sup>455</sup>

Further, the Fifth Circuit concluded that the *Austin* deci-

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445. *Id.*

446. *Id.*

447. *Id.* The district court ruled before the Supreme Court decided *Austin*. *Id.* at 297 n.3.

448. *Id.* at 298.

449. *Id.* at 299.

450. *Id.* at 298.

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

sion did not change its analysis.<sup>456</sup> In fact, the *Tilley* court read *Austin* quite narrowly. According to the court, the *Austin* reasoning applied just to forfeitures of conveyances and real estate, which, as the court elaborated, are basically different:

[Such forfeitures] have no correlation to, or proportionality with, the costs incurred by the government and society because of the large and unpredictable variances in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the criminal act. Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold.<sup>457</sup>

As such, the Fifth Circuit simply lifted the forfeiture of drug proceeds out of the *Austin* terrain.

Finally, the *Tilley* court theorized that the forfeiture of drug proceeds can never be punishment.<sup>458</sup> In so doing, the court referred to Blackstone's concept of "property . . . [as] a right derived from society which one lost [through forfeiture] by violating society's laws."<sup>459</sup> But, according to the court, when property comes from unlawful activities, the owner loses nothing to which he ever had an entitlement.<sup>460</sup> The court thus basically likened drug proceeds' forfeiture "to the seizure of proceeds from the robbery of a federal bank . . ."<sup>461</sup> Consequently, because the court concluded that the forfeiture of illegal proceeds "places the party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme," the provision is not punitive.<sup>462</sup>

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456. *Id.* at 299-300.

457. *Id.* at 300.

458. *Id.*

459. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*382). See also *Salinas*, 65 F.3d at 554 (In adopting the *Tilley* view, the court reasoned that drug proceeds' forfeiture is different because "one never acquires a property right to proceeds, which include not only cash but also property secured with the proceeds of illegal activity."). Cf. *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) (In a civil RICO forfeiture where claimant had been convicted on criminal racketeering charges, the court said that proceeds forfeiture "cannot be considered punishment, . . . as it simply parts the owner from the fruits of the criminal activity."); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (In a civil SEC action to force a convicted defendant to disgorge profits from illegal trading, the court deemed it to not be punishment because it "merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.").

460. *Tilley*, 18 F.3d at 300.

461. *Id.*

462. *Id.* In *United States v. Arreola-Ramos*, 60 F.3d 185 (5th Cir. 1995), the Fifth Circuit indicated that the only determinative issue is whether the civil forfeiture at is-

2. *The Myth of Non-Punishment.* First, the *Tilley* decision was internally repugnant.<sup>463</sup> While the Fifth Circuit purported to read *Halper* as requiring an ad hoc examination of "the sanction 'as applied in the individual case'" to determine whether it "serve[s] the goals of punishment,"<sup>464</sup> the court actually dealt with the punishment issue in quite a non-individual way.

In *Halper*, the Supreme Court expressed its concern that because the defendant's crimes netted him \$585 in excess payments from the government and the government's costs with respect to that defendant were about \$16,000, the additional penalty of \$130,000 could indeed be punitive.<sup>465</sup> The *Tilley* court, however, was not wholly focused on the individual factors, but more on the ostensibly sensationalist statistics that reveal that "illegal drug sales produce approximately \$80 to \$100 billion per year while exacting \$60 to \$120 billion per year in costs to the government."<sup>466</sup> From this "national" vantage point, the court shifted somewhat precipitously to its more pin-pointed statement that there exists "a rough proportionality between the \$650,000 sanction and the resulting governmental and societal costs" in the case *sub judice*.<sup>467</sup>

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sue amounts to punishment. In *Arreola-Ramos*, the time frame for contesting the forfeiture had expired and *Arreola* had neither entered an appearance nor contested the forfeiture. Consequently, title to the funds vested in the government. About six weeks later, *Arreola* sought dismissal of the indictment against him on the basis of double jeopardy. The district court denied the motion and in so doing, reasoned that because *Arreola* was not a party to the civil forfeiture, such proceedings could not place him in jeopardy. See also *infra* text accompanying note 561. In its affirmance, however, the Fifth Circuit suggested that the real and perhaps only focal point is the issue of punishment:

[I]f the pending criminal trial in this case were to result in a conviction, *Arreola* would be subject[] to punishment. And it follows that if the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause would bar the pending criminal trial.

*Arreola-Ramos*, 60 F.3d at 192.

463. The Fifth Circuit also apparently contradicted its own precedent. In *Weed v. United States*, 863 F.2d 417, 421 (5th Cir. 1989), the very three judges that decided *Tilley* concluded that the forfeiture of proceeds under 21 U.S.C. § 881(a)(6) "cannot seriously be considered anything other than an economic penalty for drug trafficking."

464. *Tilley*, 18 F.3d at 298. In *United States v. Perez*, 70 F.3d 345, 348-49 (5th Cir. 1995), the Fifth Circuit recognized that "[t]he *Austin* Court specifically rejected a case-by-case approach to the punishment determination for § 881(a)(4) and 881(a)(7)" and distinguished *Tilley*, which dealt with § 881(a)(6) "to which the logic of *Austin* does not apply."

465. *United States v. Halper*, 490 U.S. 435, 439 (1989).

466. *Tilley*, 18 F.3d at 299.

467. *Id.*



In a sense, the *Tilley* court's approach was reminiscent of the sort of study that might comprise some groundwork for the enactment of a statutory amount or formula for forfeiture of the proceeds from drug sales which would automatically pass a *Halper* proportionality test. The *Tilley* approach did not, however, really conform to the requisites of the individualized assessment that the *Halper* Court ordered when it remanded the *Halper* case for the determination of the government's actual costs and for an application of the rational relation test to the actual circumstances before it.

Internal repugnancy, however, was not the only defect in the *Tilley* opinion. Another glitch was the opinion's disharmony with *Austin*.<sup>468</sup> In *Austin*, the Supreme Court determined that § 881 conveyances and real estate forfeitures are, by their very nature, punitive.<sup>469</sup> The *Tilley* court's attempt to except the forfeiture of drug proceeds from the *Austin* reasoning failed for numerous reasons, the most rudimentary one, of course, being the actual breadth of the analysis in *Austin*. That is, the *Austin* reasons conformed quite comfortably to the § 881(a)(6) forfeiture at issue in *Tilley*.<sup>470</sup>

As discussed above, the *Austin* Court came to the punitive nature of the specific forfeiture provisions at issue after reviewing forfeiture history.<sup>471</sup> Through this backward glance at the forfeitures existing in England at the time of the ratification of the Eighth Amendment, the Court extracted a common denominator—namely, their punitive character. Also, after reviewing early American statutory forfeiture, the *Austin* Court recognized that such proceedings basically "follow the same pattern"—a decidedly punitive one.<sup>472</sup>

The Court in *Austin* formulated its holding through the guilty property fiction, which similarly rests upon a punitive concept that resides in *all* types of forfeiture. In addition, the

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468. See *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1486 (10th Cir. 1996); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S. Ct. 762 (1996), *rev'd*, 116 S. Ct. 2135 (1996). See also discussion *infra* Part IV.B; Kessler, *supra* note 9, at 219 (discussing the Ninth Circuit's rejection of *Tilley*); McClain, *supra* note 119, at 976-79 (arguing that § 881(a)(6) forfeiture is punishment after *Austin*). In *Bennis v. Michigan*, 116 S. Ct. 994, 1010 (1996) (Stevens, J., dissenting) and *Ursery*, however, the Supreme Court indicated a willingness to view *Austin* quite narrowly—as a decision dealing solely with the excessive fines' clause.

469. See generally discussion *infra* Part II.B.1.2.

470. See McClain, *supra* note 119, at 977.

471. See *supra* notes 227-233 and accompanying text.

472. *Austin v. United States*, 509 U.S. 602, 614-15 (1993).

*Austin* Court's summation "that forfeiture generally and statutory in rem forfeiture in particular . . . have been understood, at least in part, as punishment"<sup>473</sup> endowed the decision with sufficient girth to immure all forfeiture mechanisms. As such, the *Austin* train of thought did not legitimately provide a basis for what the *Tilley* court did—namely, except drug proceeds forfeiture from the genre of punitive provisions.

The *Austin* Court also focused on the specific provisions, § 881(a)(4) and § 881(a)(7), and "[f]ound] nothing in [them] or their legislative history to contradict the historical understanding of forfeiture as punishment."<sup>474</sup> Contrary to the *Tilley* court's opinion, therefore, a comparable analysis performed on the drug proceeds forfeiture provision in § 881(a)(6) should arrive at the same conclusion as did the *Austin* Court. The *Austin* Court, stressing that § 881(a)(4) and (a)(7) have express innocent owner defenses, said that they "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less."<sup>475</sup> Because § 881(a)(6) at issue in *Tilley* also contains an innocent owner defense, such forfeiture is and should be deemed just as punitive.<sup>476</sup>

The Congressional intent behind § 881(a)(6) further undermines the *Tilley* decision. Specifically, Congress believed that the "penal nature of forfeiture statutes" and the "substantial connection between the property and the underlying activity" warranted the 1978 § 881(a)(6) amendment.<sup>477</sup> In fact, the *Austin* Court pointed to that exact Congressional note in analyzing § 881(a)(4) and (a)(7), which implicitly link these provisions to their also "punitive" § 881(a)(6).<sup>478</sup> Of course, what this indicates is that Congress, as the *Austin* Court saw it, intended § 881(a)(6) to be something not *sui generis*, but instead more of a prototype of punitive forfeiture.<sup>479</sup>

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473. *Id.* at 618 (emphasis added).

474. *Id.* at 619.

475. *Id.* See also *Bennis v. Michigan*, 116 S. Ct. 994, 1000 (1996) (quoting *Austin*, 509 U.S. at 620 (1993) (statutory innocent owner defense "is additional evidence that the statute itself is 'punitive' in motive.")).

476. See 21 U.S.C. § 881(a)(6) (1994) ("[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."). See also *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1486 (10th Cir. 1996); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1221 (9th Cir. 1994), *rev'd*, 116 S. Ct. 2135 (1996).

477. See *McClain*, *supra* note 119, at 977.

478. *Austin v. United States*, 509 U.S. 602, 620-21 (1993).

479. Also, in *9844 S. Titan Court*, 75 F.3d at 1486, the Tenth Circuit pointed out that:

Also, the *Tilley* court's approach can not really square with the very reason the *Austin* Court departed from the *Halper* requirement of a "particularized assessment" approach.<sup>480</sup> The *Austin* Court noted that § 881(a)(4) and (a)(7) forfeitures were punitive on their face because of the "dramatic variations in the value of [the forfeitable] property."<sup>481</sup> Contrary to the *Tilley* view, the same could be said of drug proceeds forfeiture.<sup>482</sup>

Further, in rejecting the ad hoc *Halper* method, the *Austin* Court suggested that even when there exists an albeit "coincidental" proportionality between the government's costs and the amount of the sanction, the forfeiture is nevertheless punitive.<sup>483</sup> The *Austin* Court attributed this to the historical notion that forfeiture serves "not simply remedial goals but also those of punishment and deterrence."<sup>484</sup> Such reasoning congeals with the concept that the United States Supreme Court espoused in *United States v. Ward*, that "the 'forfeiture' of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."<sup>485</sup> Consequently, even if the *Tilley* court were correct that drug proceeds have a uniquely proportional relationship between the proceeds amount and the governmental costs, that supposed aspect would not transform such forfeiture into something non-punitive. Under a fair reading of *Austin*, forfeiture is always a penalty because its very proclivity is to lack that requisite proportionality.

The *Tilley* court's view that forfeiture "will always be directly proportional to the amount of drugs sold,"<sup>486</sup> was skewed for still more reasons. The plain language of § 881(a)(6) permits forfeiture of "things of value" not just "furnished," but "*intended to be furnished* . . . in exchange for a controlled substance" and of "moneys, negotiable instruments and securities," not just "used" but "*intended to be used* to facilitate any violation of [the]

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Drug Proceeds are also forfeitable under the criminal forfeiture statute. 21 U.S.C. § 853(a)(1). If the forfeiture of drug proceeds under 881(a)(6) were held not to be punishment, and if the civil and criminal labels are indeed not dispositive of the double jeopardy issue, there would be no principled way to avoid applying *Tilley's* reasoning to 853(a)(1).

480. *Halper*, 490 U.S. at 448.

481. *Austin*, 509 U.S. at 621.

482. See McClain, *supra* note 119, at 977-78 (asserting that "the amount of proceeds forfeited via § 881(a)(6) varies dramatically with and has no rational relation to the amount of the government's actual costs.").

483. *Austin*, 509 U.S. at 622 n.14.

484. *Id.*

485. 448 U.S. 242, 254 (1980).

486. *Tilley*, 18 F.3d at 300.

subchapter.”<sup>487</sup> Such properties, statutorily entitled as “intended,” are, *at best*, embryonically tainted. They have not yet emerged as viable proceeds and thus, are not necessarily “directly proportional to the amount of drugs sold.”<sup>488</sup>

In its discussion, the *Tilley* court repeated the Blackstonian bromide that “property was a right derived from society which one lost [through forfeiture] by violating society’s laws.”<sup>489</sup> From there, the court extrapolated that with respect to drug proceeds forfeiture, “the forfeiting party loses nothing to which the law ever entitled him.”<sup>490</sup> Here too the very language of § 881(a)(6) defuses what has become a Blackstone platitude. If the conduct that casts property as non-property is a violation of society’s laws, then that pivotal event has *not* occurred with respect to the § 881(a)(6) property categorized as “intended.” Also, if we abide by the *Tilley* premise that loss of something that the law never entitled the owner to possess is not punitive, then the loss of the “intended” something to which the owner is still technically *entitled* is deterrent, retributive and thus, by very definition—punitive.

Further, the *Tilley* court’s exemption of drug proceeds forfeiture could not honestly survive the *Kurth Ranch* decision. The *Tilley* court explained that loss of the proceeds was not punitive because the possessor “never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds.”<sup>491</sup> The court elaborated that such an owner “ha[d] no reasonable expectation that the law will protect, condone or even allow, [the] continued possession of such proceeds because they have their very genesis in illegal activity.”<sup>492</sup>

Much of that *Tilley* language could likewise encompass the drug tax at issue in *Kurth Ranch*. After all, Montana imposed a civil penalty on the “possession and storage” of items, which also

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487. 21 U.S.C. § 881(a)(6) (1994) (emphasis added). See also \$405,089.23 U.S. Currency, 33 F.3d at 1221 and discussion *infra* Part IV.B. See also McClain, *supra* note 119, at 978-80.

488. *Tilley*, 18 F.3d at 300 (emphasis added). Also, as the concurrence in the Sixth Circuit decision in *Salinas* suggests, having special treatment for § 881(a)(6) forfeiture means that “double jeopardy protection will often depend on which theory the government utilizes to justify the civil forfeiture.” 65 F.3d at 554. Thus, characterizing the property as “drug proceeds” instead of as “the car used to carry narcotics” will enable the government to avoid the double jeopardy bar. *Id.*

489. *Tilley*, 18 F.3d at 300 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*299). But see McClain, *supra* note 119, at 980-82 (arguing that it is “simply not true that drug offenders have no property rights in illegally obtained proceeds.”).

490. *Tilley*, 18 F.3d at 300.

491. *Id.*

492. *Id.*

had their "genesis" in illegality and were also not the fruit of "honest labor."<sup>493</sup> As such, in *Kurth Ranch*, the punitive drug tax was directly tied to the possession of property to which the owner had no legal entitlement to possess. Also inherent in the *Kurth Ranch* Court's qualification that the unlawfulness of an activity does not automatically prevent its taxation as property<sup>494</sup> is an awareness that illegality is not always a magic status that instantly transforms the res blanketly into non-property.<sup>495</sup>

While the *Tilley* court saw the nexus between the property and the illegality as a factor that made such forfeiture non-punitive, the *Kurth Ranch* Court treated that same factor as something that contrarily renders the provision more punitive. The Court in *Kurth Ranch*, in fact, stressed that the "so-called tax is conditioned on the commission of a crime" and that that was the very "unusual feature[]" which set the tax apart and divulged its "penal and prohibitory intent."<sup>496</sup> The Court even articulated that a tax "imposed on criminals and no others" and on the "possession" of property "that the taxpayer never lawfully possessed has an *unmistakable punitive character*."<sup>497</sup> Such reasoning should have put the kibosh on the *Tilley* theory that it is the snug connection between the civil penalty and the unlawful activity that makes it unmistakably non-punitive.

While the Fifth Circuit's myth of non-punitive forfeiture could not coexist with *Austin* and collided with the Supreme Court's subsequent reasoning in *Kurth Ranch*, it also effectually thwarted crucial policies behind the double jeopardy doctrine. In basing its decision on the supposed liaison between the property and the criminal offense, the court in *Tilley* put its imprimatur on the prosecutorial strategy of going after the same defendant in separate but staggered proceedings predicated on the same criminal offense. That is, under the aegis of *Tilley* and in the guise of a non-punitive forfeiture exemption, the government could unduly oppress an accused by making him or her leap through multiple blazing hoops.<sup>498</sup>

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493. Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 773 (1994) (describing Montana's Dangerous Drug Tax Act).

494. *Id.* at 778.

495. In fact, the Fifth Circuit has recognized this. See Wood v. United States, 863 F.2d 417, 419 (5th Cir. 1989) (acknowledging concession "that the gains from illegal activities are just as taxable as gains from legal activities" and rejecting argument that the IRS could not tax drug proceeds that were already forfeited to the government).

496. *Kurth Ranch*, 511 U.S. at 781 (emphasis added).

497. *Id.* at 783 (emphasis added).

498. See discussion of policies behind the Double Jeopardy Clause, *supra* Part I.A.

## IV. A POTENTIAL MYTHLESS FORFEITURE

The Ninth and Seventh Circuits, joined by the Tenth Circuit, came closest to accepting a mythless civil in rem forfeiture with double jeopardy protection. As explored below, true mythlessness entails the rejection of the government's efforts to portray the civil forfeiture and criminal conviction as different offenses.

A. *The Always Separate and Always Punitive Approach*

1. *The Ninth Circuit Decision in United States v. \$405,089.23 U.S. Currency*. In *\$405,089.23 U.S. Currency*, the government accused Charles Arlt, James Wren and others of conducting a large-scale methamphetamine manufacturing operation.<sup>499</sup> Apparently, through a series of front operations, the individual defendants tried to make it seem as if they were involved in a legitimate gold mining enterprise.

The government instituted a civil forfeiture action five days after the grand jury issued a superseding indictment in the parallel criminal case.<sup>500</sup> The forfeiture complaint described several thousand dollars worth of property, all of which the government argued were connected to the offenses that were the subject of the criminal case.<sup>501</sup> Specifically, the government claimed that the property should be forfeited as proceeds of illegal narcotics transactions and as property "involved in" money laundering.<sup>502</sup> Arlt, Wren and one of the "front corporations" filed claims to the res.<sup>503</sup> Then, after a stipulation between the parties, the district court stayed the civil forfeiture action pending completion of the parallel criminal case.<sup>504</sup>

Over eight months after Arlt, Wren and their codefendants were convicted of various counts of conspiracy and money laundering in the criminal case, the government filed a motion for

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499. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S. Ct. 762 (1996), *rev'd*, 116 S. Ct. 2135 (1996).

500. *Id.*

501. *Id.* The complaint listed the following: \$405,089.23 in a Security Pacific Bank account; \$8,929.93 in three Bank of America accounts; \$123,000 in cash and 138 silver bars seized at Mayhill Bail Bonds; one Bell 47 G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction. *Id.*

502. *Id.* The government was relying on 21 U.S.C. § 881(a)(6) (1994) and 18 U.S.C. § 981(a)(1)(A) (1994) respectively.

503. *\$405,089.23 U.S. Currency*, 33 F.3d at 1214. The front corporation was Payback Mines. *Id.*

504. *Id.*

summary judgment in the forfeiture action.<sup>505</sup> In support of the motion, the government submitted the criminal conviction, a declaration of an I.R.S. Special Agent and various pieces of documentary evidence.<sup>506</sup> The government, asserting that their establishment of probable cause shifted the burden of proof to the claimants, argued that the claimants failed to demonstrate that the property was not subject to forfeiture.<sup>507</sup>

The district court granted the government's motion and ordered that the entire res be forfeited to the United States.<sup>508</sup> In an order which essentially adopted the government's proposed statement of uncontroverted facts and conclusions of law, the district court determined that "[t]he convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and money laundering are sufficient for probable cause by themselves."<sup>509</sup> The court also noted, among other things, that "\$123,000 is an extremely large amount of cash, that Arlt, Wren and Hill had signature authority over several of the bank accounts, and that the vehicles were purchased with cash and placed in the name of Arlt's business . . . ."<sup>510</sup> Further, the district court concluded that the government had established probable cause under both the "narcotics proceeds" and "money laundering" theories.<sup>511</sup>

After Arlt, Wren and the front company, Payback Mines, appealed pro se, the Ninth Circuit concluded that the government had violated the Double Jeopardy Clause by obtaining the criminal convictions and then pursuing the forfeiture action.<sup>512</sup> In so doing, the Ninth Circuit began with what it isolated as "[t]he most basic element of the Double Jeopardy Clause"—namely, its protection "against efforts to impose punishment for the same offense in two or more separate proceedings."<sup>513</sup> The Ninth Circuit even harked back to the core of such Fifth Amendment protection, "that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts."<sup>514</sup>

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505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* at 1215.

511. *Id.*

512. *Id.* at 1219.

513. *Id.* at 1215.

514. *Id.* (quoting *Abbate v. United States*, 359 U.S. 187, 198-99 (1959)).

First, the Ninth Circuit addressed the issue of "whether the civil forfeiture action and the claimants' criminal prosecution constituted separate 'proceedings.'"<sup>515</sup> In answering this question affirmatively, the Ninth Circuit rejected the reasoning of the Second and Eleventh Circuits, which in its view "contradict[] controlling Supreme Court precedent as well as common sense"<sup>516</sup> and elaborated:

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different judges, and resolved by separate judgments, constitute the same 'proceeding.' In ordinary legal parlance, such actions are often characterized as 'parallel proceedings,' but not as the 'same proceeding.'<sup>517</sup>

The Ninth Circuit explained that the government could have included the forfeiture count in the same indictment as the other criminal counts and then tried all such counts in one proceeding.<sup>518</sup> If this had been the government's *modus operandi*, the forfeiture case and the criminal prosecution would have comprised the "same proceeding."<sup>519</sup>

The government, however, chose to avail itself of two "separate parallel proceedings," which gave it a distinct advantage.<sup>520</sup> Specifically, success in the criminal case would almost automatically ensure a forfeiture summary judgment in the government's favor. That is, the conviction and the existence of probable cause at the time the government instituted the forfeiture action would facilitate a summary civil victory.<sup>521</sup> If, however, the government lost the criminal case, it could still pursue forfeiture by relying on the more lenient standards in civil proceedings. The Ninth Circuit expressed its view that "such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to 'run the gauntlet' more than once."<sup>522</sup>

The court analogized the separate parallel actions before it

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515. *Id.* at 1216.

516. *Id.*

517. *Id.* The Ninth Circuit has also rejected the argument that "[c]lose coordination between state and federal authorities . . . does not implicate the Double Jeopardy Clause." *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 987 (9th Cir. 1995).

518. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216-17.

519. *Id.* *Accord* *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1487-88 (10th Cir. 1996).

520. *\$405,089.23 U.S. Currency*, 33 F.3d at 1217.

521. *Id.*

522. *Id.* (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)).



to the situation in *Jeffers v. United States*,<sup>523</sup> in which the Court found that the double jeopardy clause would apply when the government initiated parallel actions against the same defendant based on the same conduct by bringing two separate indictments on the same day.<sup>524</sup> The Ninth Circuit, finding that the *reasoning* in *Jeffers* would bear on the case before it,<sup>525</sup> said that it could "discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action."<sup>526</sup>

In dealing with the second issue of whether the forfeiture amounted to punishment, the Ninth Circuit relied on the *Halper* decision and its language that congressional labels such as "civil" and "criminal," are not the determinative factors.<sup>527</sup> As the Ninth Circuit reiterated, under *Halper*, "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."<sup>528</sup>

Noting its earlier decision in *United States v. McCaslin*<sup>529</sup> in which it declined to apply *Halper* to a civil forfeiture action, the Ninth Circuit conceded that the Supreme Court really obliterated that analysis by subsequently concluding in *Austin* that "Congress understood . . . [certain forfeiture] . . . provisions as serving to deter and to punish . . ."<sup>530</sup> In the Ninth Circuit's view, although *Austin* involved the Eighth Amendment's Exces-

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523. 432 U.S. 137 (1977).

524. *Id.* at 140. One indictment charged *Jeffers* with a conspiracy to distribute heroin and cocaine under 21 U.S.C. §§ 841(a)(1) and 846. *Id.* The other charged him with conducting a continuing criminal enterprise to violate 21 U.S.C. § 848. *Id.* at 141. When *Jeffers* opposed the government's motion to join the offenses for trial, the district court disallowed the joinder. *Id.* at 142-43.

After the first jury convicted *Jeffers* of conspiracy, the defendant sought dismissal of the continuing criminal enterprise case on the basis of double jeopardy. *Id.* at 143. The district court, determining that the two cases involved separate offenses, denied *Jeffers'* motion and the Seventh Circuit affirmed. *Id.* at 144-46. Although the Supreme Court also affirmed, it explicitly rejected the double jeopardy analysis below. *Id.* at 151. The *Jeffers* Court had determined that the conspiracy to distribute offense was a lesser included offense of the continuing criminal enterprise charge and thus, constituted the "same offense" under the *Blockburger* test. *Id.* at 147-58. See discussion *infra* Part IV.C.

525. In *Jeffers*, however, the plurality of four justices determined that because *Jeffers* had opposed the government's motion for joinder, he had waived an objection to the two separate proceedings. 432 U.S. at 152.

526. \$405,089.23 U.S. Currency, 33 F.3d at 1218.

527. *Id.* (citing *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

528. *Id.* at 1219 (quoting *Halper*, 490 U.S. at 448).

529. 959 F.2d 786 (9th Cir. 1992).

530. \$405,089.23 U.S. Currency, 33 F.3d at 1219.

sive Fines Clause, it had to actually have "resolve[d] the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well . . . ." <sup>531</sup>

In addition, the Ninth Circuit addressed what appeared to be the government's position that courts must decide "in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as 'punishment.'" <sup>532</sup> Interpreting the *Austin* decision as an explicit refusal to adopt such an ad hoc method, the Ninth Circuit felt obliged instead to view the forfeiture statute as a whole and to track the principles that the *Austin* Court worked into the punishment analysis.

The Ninth Circuit essentially framed the discussion with the "strong presumption that any forfeiture statute does not serve *solely* a remedial purpose." <sup>533</sup> Also, because such statutes hinge on the property owner's culpability and exempt the innocent, they aim to deter and punish the guilty. Further, Congress' connection of forfeiture to the commission of specific offenses suggests that a reasonable construction is that forfeiture, at least in part, serves to deter and punish. Thus, the Ninth Circuit's employment of the *Austin* considerations warranted a conclusion that the statutes before it "operate[d] at least in part to punish and deter." <sup>534</sup>

Further, the Ninth Circuit explained why it was rejecting the position that the government had advanced, that because "the forfeiture statutes involved are limited to the forfeiture of illegal proceeds, . . . they therefore do not impose 'punishment.'" <sup>535</sup> The Ninth Circuit, opining that "the government [had] misrepresent[ed] the sweep of the forfeiture statutes," determined that the enactments were not limited to the proceeds of illegal activity. <sup>536</sup> As the Ninth Circuit saw it, the narcotics proceeds forfeiture statute did not just refer to "money that *has been furnished* in exchange for drugs," but applied to "nearly any money that is involved in a narcotics transaction in some fashion." <sup>537</sup> In particular, the statute makes forfeitable "money that someone intends to use to purchase drugs, or even money

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531. *Id.*

532. *Id.* at 1220.

533. *Id.* at 1221 (citing *Austin v. United States*, 509 U.S. 602, 621 (1993)).

534. *Id.* Accord *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1484-87 (10th Cir. 1996).

535. \$405,089.23 *U.S. Currency*, 33 F.3d at 1220.

536. *Id.* at 1221.

537. *Id.* See also *supra* notes 487-91 and accompanying text.

that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction."<sup>538</sup>

The Ninth Circuit believed that the money laundering statute was similarly broad because it rendered forfeitable "any property 'involved in' an illegal money laundering transaction."<sup>539</sup> In fact, the government itself had substantiated that interpretation by arguing in the trial court that the forfeitable property exceeded the money that the defendants had actually laundered.

In its decision, the Ninth Circuit actually outlined the practical ramifications which would force the government to either include a criminal forfeiture count in the indictment or to pursue only the civil forfeiture action.<sup>540</sup> The former option would entail the government's relinquishment of the favorable burdens it would have in the civil forfeiture proceeding and the latter would mean giving up the criminal prosecution. The court emphasized that such a choice was "entirely reasonable."<sup>541</sup>

2. *The Seventh Circuit Decision in United States v. Torres.* In *Torres*, Renato Torres and a companion were about to pay \$60,000 for three kilograms of cocaine.<sup>542</sup> It turned out, however, to be a trap—the sellers were really federal agents.<sup>543</sup> The government commenced separate administrative and criminal proceedings, one seeking forfeiture and the other imprisonment and a fine.<sup>544</sup>

Torres pleaded guilty to the drug offenses and received a prison sentence.<sup>545</sup> In the forfeiture proceeding, however, Torres did not make a claim.<sup>546</sup> On appeal, Torres argued that under the double jeopardy clause, the forfeiture of the money barred the sentence of imprisonment.<sup>547</sup>

The Seventh Circuit, relying on *Austin* and *Halper*, said that forfeiture and civil fines can be penalties for crime.<sup>548</sup> It

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538. \$405,089.23 U.S. Currency, 33 F.3d at 1221. See also *supra* notes 487-91 and accompanying text.

539. \$405,089.23 U.S. Currency, 33 F.3d at 1221 (quoting 18 U.S.C. § 981(a)(1)(A) (1994)).

540. *Id.* at 1222.

541. *Id.*

542. *United States v. Torres*, 28 F.3d 1463, 1464 (7th Cir. 1994).

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.* at 1464-65.

547. *Id.* at 1464.

548. *Id.*

also said that under *Halper* and *Kurth Ranch*, a financial exaction can count as a separate jeopardy.<sup>549</sup> In the Seventh Circuit's view, the Supreme Court trilogy meant that the government should seek imprisonment, fines and forfeiture in a unitary proceeding.<sup>550</sup> The court, however, recognized that in the in rem forfeiture proceeding, third persons could have claims to the *res* and that the government could not really resolve all such claims in the criminal proceedings which were lodged against particular defendants.<sup>551</sup> The court thus suggested that the government should seek in the criminal indictment to forfeit the defendant's interest, if any, in the property and then clean up the other claims through the administrative proceedings.<sup>552</sup>

Significantly, the Seventh Circuit said point blank that "[c]ivil and criminal proceedings are not only docketed separately but tried separately, and under the double jeopardy clause separate trials are an anathema."<sup>553</sup> The court further speculated that where the forfeiture proceeding ends first, the accused in the criminal trial can assert the former conviction or acquittal as a bar.<sup>554</sup>

The *Torres* court emphasized that the Constitution does not prohibit "cumulative punishments imposed at the end of a single trial."<sup>555</sup> The problem, however, was that "[s]eparate administrative and criminal proceedings can lead to two trials, each of which produces a punishment for the same offense."<sup>556</sup> The court also said that even if the two trials are close in time, they still present a double jeopardy problem.<sup>557</sup> The Seventh Circuit found support for this in *Kurth Ranch*, in which the tax proceeding and the criminal proceeding began and were pending at the same time.<sup>558</sup>

Although the Seventh Circuit said that the *Torres* case could have triggered the double jeopardy bar, such a challenge

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549. *Id.*

550. *Id.*

551. *Id.* at 1464 n.1.

552. *Id.*

553. *Id.* at 1465.

554. *Id.*

555. *Id.* The *Torres* Court, relying on *Ohio v. Johnson*, 467 U.S. 493 (1984), *Missouri v. Hunter*, 459 U.S. 359 (1983) and *Albernaz v. United States*, 450 U.S. 333 (1981), elaborated that "the double jeopardy clause does not bar cumulative punishments imposed in a single proceeding—whether these punishments be the ordinary combination of prison plus a fine, or consecutive terms in prison, or prison plus a forfeiture." *Torres*, 28 F.3d at 1464. See also *supra* notes 53-54 and accompanying text.

556. *Torres*, 28 F.3d at 1465.

557. *Id.*

558. *Id.*

was unavailable to Torres because he did not become a party to the forfeiture action.<sup>559</sup> Despite Torres' receipt of notice inviting him to make a claim in the civil forfeiture proceeding, he declined to do so.<sup>560</sup> Because the money was forfeited without opposition, jeopardy simply did not attach.<sup>561</sup>

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559. *Id.*

560. *Id.*

561. *Id.* The court stated that "[a]s a non-party, Torres was not at risk in the forfeiture proceeding, and 'without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.'" *Id.* (quoting *Serfass v. United States*, 420 U.S. 377, 391-92 (1975)).

The Seventh Circuit has followed *Torres* on numerous occasions and has determined that an individual's failure to contest the forfeiture in the forfeiture proceedings precludes the application of double jeopardy principles. *See, e.g., United States v. Vega*, 72 F.3d 507, 514 (7th Cir. 1995) (a petition for remission and mitigation does not serve to contest the forfeiture and is, therefore, insufficient to trigger the Double Jeopardy Clause); *United States v. Ruth*, 65 F.3d 599, 603-04 (7th Cir. 1995).

Other Circuits have similarly precluded individuals from claiming double jeopardy protection where they have either failed to contest forfeiture or where arguably jeopardy did not attach. *See, e.g., United States v. McDermott*, 64 F.3d 1448, 1455 (10th Cir. 1995) ("[T]he mere filing of an administrative claim [is not] sufficient to trigger jeopardy, at least where that act converts the proceeding to a judicial one with opportunity for a hearing"); *United States v. Washington*, 69 F.3d 401, 403 (9th Cir. 1995) (no double jeopardy claim because "Washington failed to contest the propriety of the seizure judicially by filing a claim of ownership and posting a bond, or administratively by filing a petition for remission or mitigation."); *United States v. Sanchez-Cobarruvias*, 65 F.3d 781, 784 (9th Cir. 1995) (Although "Sanchez made some showing of opposing the civil forfeiture when, at the time of his arrest, he filled out the Petition for Remission or Mitigation of Forfeiture and Penalties Incurred form and checked off the appropriate box on the related Election of Proceedings form[,] . . . there was no finality to the civil administrative forfeiture proceeding" and thus "the subsequent criminal prosecution was not barred."); *United States v. Wong*, 62 F.3d 1212, 1214 (9th Cir. 1995) (The petition for remission or mitigation is "a preliminary administrative step, which precedes the filing of a civil forfeiture complaint and formal jeopardy proceedings, [and] does not create jeopardy."); *United States v. Cretacci*, 62 F.3d 307, 310 (9th Cir. 1995) (An administrative forfeiture of unclaimed property does not constitute punishment for purposes of the Double Jeopardy Clause); *United States v. Kearns*, 61 F.3d 1422, 1428 (9th Cir. 1995) ("[I]n a civil forfeiture proceeding, [jeopardy] attaches no earlier than the date on which the defendant filed an answer to the forfeiture complaint."); *United States v. Sykes*, 73 F.3d 772, 773-74 (8th Cir. 1996) (defendant was not a party to the completed administrative forfeitures because he did not contest them; with respect to the pending forfeitures, although he intervened in the proceedings and asserted ownership of the property, the government's stay of the proceedings prevented the attachment of jeopardy); *United States v. Clark*, 67 F.3d 1154, 1163 (5th Cir. 1995) (There is no double jeopardy where property was administratively forfeited prior to sentencing); *United States v. Bethancourt*, 65 F.3d 1074, 1082 (3d Cir. 1995) ("[T]he double jeopardy argument is meritless . . . [because] the [money] was not seized through a court proceeding, but rather administratively by the DEA."); *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160, 1167 (3d Cir. 1995) ("[Claimant's] filing of a motion to set aside the default judgment . . . some four years after the judgment had been entered" means that he did not participate in the proceeding and was not placed in jeopardy).

### B. *Mythlessness and Mandatory Joinder*

The Ninth Circuit decision and the Seventh Circuit dicta comprise a nidus for a concept of forfeiture without myths to deprive such claimants of double jeopardy protection.<sup>562</sup>

In *\$405,089.23 U.S. Currency*, the Ninth Circuit concluded that the parallel civil forfeiture actions and criminal prosecutions are always separate and that civil forfeiture is always punitive.<sup>563</sup> In so doing, the Ninth Circuit put itself at odds with the Second,<sup>564</sup> Fifth,<sup>565</sup> Sixth<sup>566</sup> and Eleventh<sup>567</sup> Circuits and adhered to the Supreme Court decisions in *Halper*, *Austin* and *Kurth Ranch*.

The Ninth Circuit aptly criticized the Second and Eleventh Circuits' characterization of the parallel civil and criminal cases as a "single, coordinated prosecution" and said that those courts have "contradict[ed] controlling Supreme Court precedent."<sup>568</sup> As discussed above, the district court in *Halper* granted summary judgment against Halper under the civil False Claims Act after Halper was convicted, sentenced and fined.<sup>569</sup> Implicit in the Supreme Court's decision that such a statutory civil penalty, as applied to Halper, could violate the Double Jeopardy Clause was the view of the parallel criminal and civil proceedings as separate.

Also, as discussed above, the *Kurth Ranch* Court's description of the raid on the farm as giving rise to "four separate . . . proceedings," one of which is the civil forfeiture action, sug-

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In the amended order on rehearing, the Ninth Circuit dissenters asserted that the Court let stand a decision that "could free hundreds of drug dealers across the Western United States." *United States v. \$405,089.23 U.S. Currency*, 56 F.3d 41, 42 (9th Cir. 1995) (quoting *Why a Major Drug Suspect May Go Free*, S.F. CHRON., May 9, 1995, at A1. So many decisions, however, finding the failure of the attachment of jeopardy should really prevent such a conjectured fear from becoming a reality.

562. After the Supreme Court granted certiorari in *\$405,089.23 U.S. Currency*, the Tenth Circuit aligned itself with the Ninth. *United States v. 9844 S. Titan Court*, 75 F.3d 1470 (10th Cir. 1996).

563. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S. Ct. 762 (1996), *rev'd*, 116 S. Ct. 2135 (1996).

564. *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993).

565. *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994).

566. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996).

567. *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994). Because later the Eighth Circuit aligned itself with the Second Circuit in *United States v. Smith*, 75 F.3d 382 (8th Cir. 1996), the Ninth and Eighth Circuit decisions also conflicted.

568. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216.

569. *United States v. Halper*, 490 U.S. 435, 438 (1989).

gested that the Court saw such a civil proceeding as separate from the criminal prosecution.<sup>570</sup> Further, that Court's treatment of Montana's tax collection proceeding as "the functional equivalent of a *successive* criminal prosecution that placed the Kurths in jeopardy a *second* time 'for the same offence,'"<sup>571</sup> should have foreclosed the notion that the separate civil and criminal cases can be treated as consolidated.

Unlike the Fifth Circuit, the Ninth Circuit correctly understood that the *Austin* Court "resolve[d] the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause . . ." by rejecting a "case-by-case approach to determining whether forfeiture constitutes 'punishment.'"<sup>572</sup> In fact, the Ninth Circuit, by sifting through the principles underlying *Austin*, soundly repudiated the theory that *Austin* somehow warranted anomalous treatment of drug proceeds forfeiture. As the Ninth Circuit saw it, *Austin's* core, which was "the historical understanding of forfeiture as punishment," comprehended both money laundering and drug proceeds forfeiture.<sup>573</sup>

In addition, the Ninth Circuit illuminated the fact that both of the statutes before it, like the provisions at issue in *Austin*, contain "innocent owner" defenses, which have a distinctly punitive flavor.<sup>574</sup> Further, the Ninth Circuit, in contrast to the Fifth, found that under *Austin* a tight ligature between the forfeiture and the commission of a specified offense should actually strengthen the presumption that such forfeiture provisions are punitive.<sup>575</sup>

The Seventh Circuit dicta in *Torres* similarly abided by the Supreme Court trilogy. The Seventh Circuit, like the Ninth, rejected the Second and Eleventh Circuits' treatment of the parallel civil and criminal proceedings as single and pointed out that the *Millan* and *18755 N. Bay Rd.* decisions can no longer be considered good law after *Kurth Ranch*.<sup>576</sup> Also, what was im-

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570. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 771-72 (1994) (emphasis added).

571. *Id.* at 784 (emphasis added).

572. \$405,089.23 *U.S. Currency*, 33 F.3d at 1219-20.

573. *Id.* at 1220 (quoting *Austin v. United States*, 509 U.S. 602, 619 (1993)).

574. *Id.* at 1221. *Accord Bennis v. Michigan*, 116 S. Ct. 944, 1000 (1996) (statutory innocent owner defense is "additional evidence that the statute itself is 'punitive' in motive.").

575. \$405,089.23 *U.S. Currency*, 33 F.3d at 1221 ("[W]here Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.").

576. *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994), *cert. denied* 115 S.

plicit in the Seventh Circuit opinion was the understanding that after *Austin*, forfeiture is always punitive. In discussing "cumulative punishment," the *Torres* court enumerated that such "punishments [can] be the ordinary combination of prison plus a fine, or consecutive terms in prison, or prison plus a *forfeiture*."<sup>577</sup> After describing the impact of a criminal trial in the wake of a narcotics forfeiture proceeding, the Seventh Circuit condemned that as "lead[ing] to two trials, each of which produces a *punishment* for a single offense."<sup>578</sup>

What the Ninth and Seventh Circuits appeared to share is an understanding that the law after *Halper*, *Austin* and *Kurth Ranch* mandates joinder if the government wishes to pursue a criminal prosecution and a forfeiture action based on the same offense. In fact, the Ninth Circuit elaborated on the *Austin* decision's effect on the government's election of strategy:

[T]he government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally).<sup>579</sup>

For the government seeking both forfeiture and other forms of criminal punishment, what the Ninth Circuit recognized was that such a mandatory joinder rule would, of course, promote greater reliance on criminal forfeiture.<sup>580</sup>

The Seventh Circuit similarly suggested that the only way the government can avoid the double jeopardy impasse is for it to seek the forfeiture and the criminal punishment in a single indictment. The Seventh Circuit analysis, however, appeared somewhat more enlightened than that of the Ninth Circuit. Although the Ninth Circuit recognized that *Austin*'s effect is to encourage mandatory joinder and greater reliance on criminal for-

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Ct. 669 (1994). See also *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1487-88 (10th Cir. 1996) (quoting and approving Judge Easterbrook's dicta in *Torres*). *Contra United States v. Smith*, 75 F.3d 382 (8th Cir. 1996).

577. *Torres*, 28 F.3d at 1464 (emphasis added).

578. *Id.* at 1465 (emphasis added).

579. \$405,089.23 *U.S. Currency*, 33 F.3d at 1222. Accord *9844 S. Titan Court*, 75 F.3d at 1487-88.

580. Congress has indicated that the main purpose of providing for criminal forfeiture was to enable the government to have all claims resolved at once. S. REP. NO. 225, 98th Cong., 1st Sess. 196 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3379 ("[t]he problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government in addition to the criminal case, to file a separate civil suit.").



feiture, it still perpetuated the myth that the double jeopardy problem before it is *separately* one of governmental exaction of successive punishments. The *Torres* language, however, indicated that the Seventh Circuit intuited that the problem was not really just one of successive punishments, but of successive prosecutions.

The Seventh Circuit's real perspective surfaced in its example of civil forfeiture that gets to trial first. In this respect, the Seventh Circuit explained that the result will be that the trier of fact either "forfeits the property or concludes that the claimant didn't do it or has some statutory defense."<sup>581</sup> From there, the Seventh Circuit posited that *either* result can bar a subsequent criminal trial. What the *Torres* court explained was that "the accused can plead former jeopardy—former conviction (and punishment) on the one hand, former acquittal on the other."<sup>582</sup>

Thus, the *Torres* court apparently grasped what the *Kurth Ranch* Court was hinting at when it said that a civil proceeding that results in punishment is "the functional equivalent of a successive criminal prosecution" that can place the accused in jeopardy a second time for the same offense.<sup>583</sup> Apparently, the *Torres* court tapped into Justice Scalia's concern in the *Kurth Ranch* dissent, that "the Double Jeopardy Clause's ban on successive criminal prosecutions . . . make[s] surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred."<sup>584</sup>

In short, while both the Ninth and Seventh Circuits proposed a mandatory joinder rule for the government wishing to obtain both forfeiture and criminal punishment, the Seventh Circuit appeared to most directly proclaim that what the Double Jeopardy Clause bars are successive punitive *ordeal*s.

### C. *Mythlessness and Resisting the Seductive Blockburger Escape Hatch*

After *Halper*, *Austin* and *Kurth Ranch*, the government tried to defeat double jeopardy protection by arguing that the criminal conviction and the civil forfeiture are not based on the same offenses.<sup>585</sup> The governing test here is, of course, the one in

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581. *Torres*, 28 F.3d at 1465.

582. *Id.*

583. *Kurth Ranch*, 511 U.S. at 784.

584. *Id.* at 801.

585. See, e.g., *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1488 (10th Cir.

*Blockburger v. United States*,<sup>586</sup> which the Supreme Court revived in *United States v. Dixon*.<sup>587</sup> Under *Blockburger*, if "each offense contains an element not contained in the other," they are not the same and thus, double jeopardy does not apply.<sup>588</sup> In

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1996) (rejecting government's argument that "even if the instant forfeiture is punishment, the civil proceeding that imposed it was not a jeopardy for the same offense."); *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160, 1171 (3d Cir. 1995) ("Under the *Blockburger/Dixon* test, the violations underlying the forfeitures and those for which [defendant] was convicted also do not constitute the 'same offenses' . . . [where] conviction . . . required proof that [defendant] participated in a conspiracy . . . [and] forfeiture required proof of a sale or exchange, and proof that the specific property was proceeds of, or traceable to, a sale or exchange."); *United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995) ("Rhodes cannot overcome the stubborn fact that the administrative forfeiture proceeding and the criminal forfeiture count were predicated on factually distinct offenses."); *United States v. Chick*, 61 F.3d 682, 687 (9th Cir. 1995) ("[C]ounts contained in the superseding indictment were based on distinctly different offenses from the offense which underlies the civil forfeiture."); *United States v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995) (rejecting government's argument "that the civil forfeiture and criminal conviction . . . do not constitute punishment for the same offense . . ."), *rev'd*, 116 S. Ct. 2135 (1996); *United States v. \$292,888.04 In U.S. Currency*, 54 F.3d 564, 568 (9th Cir. 1995) ("Because . . . prior criminal conviction was for conspiracy to import marijuana and hashish and related drug offenses, not currency transaction violations, double jeopardy is not implicated . . ."); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994) ("[U]nless the civil forfeiture . . . can be predicated upon some offense other than those for which [the defendant] has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause."); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1217-18 (9th Cir. 1994) (rejecting government's argument that civil forfeiture and criminal prosecution did not punish the same offense); *United States v. Rural Route 9*, 900 F. Supp. 1032 (C.D. Ill. 1995) (rejecting government's argument that the civil forfeitures and criminal convictions were not based on the same offense); *United States v. Shorb*, 876 F. Supp. 1183 (D. Or. 1995) (concluding that convictions and forfeiture proceedings each required proof of different elements), *aff'd in part, vacated in part* 59 F.3d 177 (9th Cir. 1995); *Crowder v. United States*, 874 F. Supp. 700 (M.D.N.C. 1994) (prosecution for money laundering conspiracy did not involve same offense or conduct as administrative forfeiture proceeding), *aff'd* 69 F.3d 534 (4th Cir. 1995); *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994) (rejecting government's argument that criminal prosecution for manufacturing marijuana and civil forfeiture proceeding were not based on the same offense). See also Dallet, *supra* note 9, at 254-56 (discussing different offense arguments); McClain, *supra* note 119, at 965-74; Zimiles, *supra* note 414 at 203-04.

586. 284 U.S. 299 (1932).

587. 509 U.S. 688 (1993). *Dixon*, a 5-4 decision, overruled *Grady v. Corbin*, 495 U.S. 508 (1990), in which the Supreme Court had held that "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," then double jeopardy operates as a bar. *Id.* at 510.

588. *Dixon*, 509 U.S. at 696. See George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027 (1995) (Because the Supreme Court has failed to set forth a clear definition of "same offense," the author posits that legislatures conceive of blameworthiness in terms of distinct blameworthy acts).

the civil forfeiture context, the *Blockburger* word formula momentarily foreboded as another potential myth that would serve to keep the Constitution at bay.

One argument that the government advanced was that "the criminal prosecution requires proof that a *person*, the defendant, committed the crime, while the forfeiture requires proof that the *property* subject to the forfeiture has been involved in the commission of a criminal violation."<sup>589</sup> Such a position, resting upon the fictive participation of the property in the offense, really constitutes a transparent rekindling of the personification taint. That is, the argument, once distilled, relies on the archaic literalism than an *in rem* forfeiture proceeding targets an inanimate defendant. The problem is that the *Austin* decision knocked the props out from such notions.

In *Austin*, the Court, examining the theory that "the property itself is 'guilty' of the offense," stripped it to its marrow—that forfeiture punishes not a thing, but a *person*.<sup>590</sup> In fact, as the Court saw it, "[i]f forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner."<sup>591</sup> As such, finessing a *Blockburger* depiction of the property as a separate element opugned what were the *Austin* Court's basic accomplishments.<sup>592</sup>

Also, the *Austin* Court's broad proclamation that property forfeiture is punishment, taken in its most unconcocted sense, equates the property with the punishment—not the offense. Language in the more recent decision, *Libretti v. United*

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589. *United States v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995), *rev'd* 116 S. Ct. 2135 (1996); *See also* 9844 S. *Titan Court*, 75 F.3d at 1490 (rejecting the same argument); *Rural Route 9*, 900 F. Supp. at 1032 (rejecting the same argument); *Shorb*, 876 F. Supp. at 1187 (rejecting the same argument); *Oakes*, 872 F. Supp. at 824 (rejecting the same argument). *But see* \$184,505.01 *In U.S. Currency*, 72 F.3d at 1170 (3d Cir. 1995) (The three forfeitures among themselves do not satisfy the "same elements" test because each "requires proof of an element that the others do not require, i.e., that the particular piece of property seized constituted illegal proceeds or was acquired with illegal proceeds.").

590. *Austin v. United States*, 509 U.S. 602, 615 (1993). *But see* *Bennis v. Michigan*, 116 S. Ct. 994 (1996), in which the Court, relying on guilty property cases, held that an owner's interest in property may be forfeited even though the owner did not know that the property would be used to violate the law.

591. *Austin*, 509 U.S. at 617. *But see* *Bennis*, 116 S. Ct. at 998, where the Court ostensibly retracted its "observation" that it had reserved the case of a truly innocent owner.

592. *See generally* *Rural Route 9*, 900 F. Supp. at 1037 (C.D. Ill. 1995) ("[T]he distinction that the Government tries to make between an offense against a person and one against property does not hold up under the Supreme Court's recent jurisprudence [in *Austin*].").

*States*,<sup>593</sup> in which the Supreme Court found that the criminal rule requiring an inquiry into the factual basis of a guilty plea did not apply to forfeiture provisions in the plea agreement, actually reinforced the *Austin* punitive concept surrounding the property. In elaborating on "the fundamental nature of criminal forfeiture,"<sup>594</sup> the *Libretti* Court said:

The fact that the Rules attach heightened protections to imposition of criminal forfeiture as punishment for certain types of criminal conduct cannot alter the simple fact that forfeiture is precisely that: punishment. The Advisory Committee's 'assumption' that 'the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved,' Advisory Committee's Notes on Fed. Rule Crim. Proc. 31, 18 U.S.C. App. p. 786, does not persuade us otherwise. The Committee's assumption runs counter to the weighty authority discussed above, all of which indicates that criminal forfeiture is *an element of the sentence* imposed for a violation of certain drug and racketeering laws.<sup>595</sup>

The fact that the *Libretti* Court was talking about criminal—not civil—forfeiture did not estrange its perspective from this discussion because the criminal forfeiture, like civil forfeiture, requires proof of the property's involvement in the commission of the criminal violation.<sup>596</sup> Also, although the Court was not engaging in the *Blockburger* "same elements" test, its expressed weddedness to what "weighty authority"<sup>597</sup> had ratified—that forfeiture is not an element of the offense but of the sentence—should transcend the contours of *Libretti* and infiltrate the double jeopardy sphere. Consequently, *Austin* in conjunction with *Libretti* suggested that the forfeiture is the punishment and the property is simply an element of that punishment.

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593. 116 S. Ct. 356 (1995).

594. *Id.* at 364.

595. *Id.* (emphasis added).

596. In *United States v. Soccoccia*, 58 F.3d 754, 783-84 (1st Cir. 1995), the court concluded that because "criminal forfeiture is a punishment, not a separate offense . . . a defendant may be subjected to a forfeiture order even if extradition was not specifically granted in respect to the forfeiture allegations." In so concluding, the *Soccoccia* Court described "modern criminal forfeiture" as "born out of the mating of two historically distinct traditions." *Id.* at 783. As the court saw it, "[o]ne parent is civil forfeiture" and the other is "old-hat criminal forfeiture, which traditionally operated as an incident of a felony conviction *in personam* against a convicted defendant, requiring him to forfeit his property to the Crown." *Id.* As the court viewed it, forfeiture provisions, like those in RICO, "combine both traditions because they act *in personam* against the defendant, yet require a nexus between the forfeited property and the crime." *Id.*

597. *Libretti*, 116 S. Ct. at 364.

In 9844 *South Titan Court*, the Tenth Circuit found the government's *Blockburger* argument to be problematic because it "presupposes that § 881 defines an offense as well as a punishment . . ."<sup>598</sup> and explained:

[I]n general, a statute may very well create a punishment without defining a separate offense. In *Kurth Ranch*, for instance, the Court did not find itself obliged to consider whether Montana's drug tax statute defined a separate offense; it was enough for double jeopardy purposes that the statute imposed a second punishment for offenses defined elsewhere. Similarly, 21 U.S.C. § 853, the criminal forfeiture statute for drug offenses, merely prescribes a punishment not a separate offense.<sup>599</sup>

Consequently, the Tenth Circuit accurately perceived that a *Blockburger* analysis in this particular context was akin to a red herring because the *Austin* Court itself determined that § 881 "defines a punishment, but not a separate offense."<sup>600</sup>

Another putative *Blockburger* argument that the government advanced was that the "criminal charges differ[] from the forfeiture allegations in that they require[] proof of scienter."<sup>601</sup> Basically, the building blocks for this position would be the *Calero-Toledo* Court's reference to forfeiture as a "penalty for carelessness"<sup>602</sup> and the *Austin* Court's discussion of forfeiture as punishment for negligence.<sup>603</sup> This, of course, ostensibly suggests a standard different from the criminal mens rea of the predicate offenses. While surely having some superficial appeal, that veneer displays its cracks under bright lights.

One problem with the mens rea theory is its questionable coexistence with *Kurth Ranch*. In *Kurth Ranch*, one defendant was adjudged guilty of the offense of possession of drugs with the intent to sell and the other five pleaded guilty to conspiracy to possess drugs with the intent to sell, violations which, of

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598. United States v. 9844 S. Titan Court, 75 F.3d 1470, 1489 (10th Cir. 1996).

599. *Id.* (citing *Libretti*, 116 S. Ct. at 364).

600. *Id.* at 1489.

601. United States v. Shorb, 876 F. Supp. 1183, 1187 (D. Or. 1995). See also 9844 S. Titan Court, 75 F.3d at 1490. See generally McClain, *supra* note 119, at 966-67 (discussing the "justification that has been offered for finding that criminal narcotics offenses are not lesser included offense of civil forfeiture" which "is that the criminal statutes require mens rea.").

602. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). See also McClain, *supra* note 119, at 966-67 ("[C]ourts have read [*Calero-Toledo*] to mean that the mens rea for civil forfeiture is 'negligence,' punishing property owners for not 'exercis[ing] greater care.'").

603. *Austin v. United States*, 509 U.S. 602, 618 (1993) ("Like the guilty-property fiction, [the] theory of vicarious liability is premised on the idea that the owner has been negligent.").

course, required proof of criminal mens rea. According, however, to the Supreme Court of Montana, the Montana Drug Tax Act, under which the tax was imposed on the *Kurth Ranch* defendants, did not require *any* finding of scienter.<sup>604</sup> Although the *Kurth Ranch* Court neither addressed the scienter or *Blockburger* issue, it did deem double jeopardy to bar that successive tax assessment. Implicit thus in the decision that the Kurths were being "placed . . . in jeopardy a second time 'for the same offence[.]"<sup>605</sup> was the rejection of the degree of scienter as a germane factor that can make the civil and criminal offenses different.<sup>606</sup>

The Government's scienter argument not only failed to square with the actual situation in *Kurth Ranch*, it also offended the *Kurth Ranch* reasoning. According to the *Kurth Ranch* Court, one disturbing feature of the tax was that it was "condition[ed] on the commission of a crime."<sup>607</sup> The Court implicitly viewed the criminal and tax proceedings as sharing *an* offense. This suggests that the conduct triggering the tax liability imbibes the crime and thus, likewise sweeps into the criminal mens rea. The language in *Austin*, reminiscent of *Kurth Ranch* thought, branded civil forfeiture as punitive for the very reason that it is "tie[d] . . . directly to the commission of drug offenses."<sup>608</sup> Where the *Kurth Ranch* and *Austin* reasoning thus coincided was the basic ascribing of the sameness of offense to the fact that the criminal violation has set up residence within the supposed civil case.

Another way of describing it is to say that the drug crimes are lesser included offenses of § 881 forfeiture and thus, are the same under *Blockburger*.<sup>609</sup> In fact, such an approach would be responsive to both of the government's attempts to distinguish the offenses on the basis of forfeiture's unique involvement of tainted property and on the differing mens rea. In fact, reason-

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604. *Sorensen v. Montana Dep't of Revenue*, 836 P.2d 29, 32 (Mont. 1992) ("[T]he tax is based on possession and storage of dangerous drugs. Where possession gives rise to the tax, we conclude that the Act does not involve a finding of scienter.").

605. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994).

606. As the Tenth Circuit suggested, the *Kurth Ranch* Court's failure to engage in a *Blockburger* analysis may be due to the fact that the Supreme Court viewed 21 U.S.C. § 881 as defining not an offense, but a punishment. *United States v. 9844 S. Titan Court*, 75 F.3d at 1489. See *supra* notes 598-602 and accompanying text.

607. *Kurth Ranch*, 511 U.S. at 781.

608. *Austin*, 509 U.S. at 620.

609. See *McClain*, *supra* note 119, at 967 ("[I]t can be argued that the various substantive drug offenses are lesser included offenses of forfeiture because they are incorporated within the provisions of section 881.").

ing in the Sixth, Ninth and Tenth Circuit decisions tackled the *Blockburger* matter in such a way.

In *Ursery*, the Sixth Circuit, concluding that "the forfeiture necessarily requires proof of the criminal offense," looked directly at the statute applying "forfeiture . . . to '[a]ll real property . . . which is used . . . to commit or to facilitate . . . a violation of this subchapter.'<sup>610</sup> What mattered to the *Ursery* Court was not the difference in the standard of proof, but what amounted to basic horse sense—that the government could not confiscate the *Ursery* home without the proof that he was committing the crime—that is, growing the marijuana.<sup>611</sup>

In the \$405,089.23 *U.S. Currency* decision, the Ninth Circuit relied on *Jeffers v. United States*<sup>612</sup> as an analogue.<sup>613</sup> In *Jeffers*, the Supreme Court found that the charge of conspiracy to distribute heroin and cocaine was the lesser included offense of the charge of conducting a criminal enterprise to violate the drug laws and that they were the "same offense" under *Blockburger*.<sup>614</sup> After summarizing *Jeffers*, the Ninth Circuit described the issue before it as one of a "civil forfeiture action which is brought and tried separately from a criminal prosecution and is based on the same offense."<sup>615</sup>

In 9844 *South Titan Court*, the Tenth Circuit pointed out that if a *Blockburger* analysis even applies, "[a]ll drug violations

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610. *United States v. Ursery*, 59 F.3d 568, 574 (6th Cir. 1995) (quoting 21 U.S.C. § 881(a)(7) (1994), *rev'd* 116 S.Ct. 2135 (1996)).

611. The *Ursery* Court stated, "[t]he criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." *Id.* See also *United States v. Tilley*, 18 F.3d 295, 297 (5th Cir. 1994) ("[I]f the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial."); *United States v. Rural Route 9*, 900 F. Supp. 1032, 1034 (C.D. Ill. 1995) ("The criminal offense is in essence subsumed by the forfeiture statute . . ."); *Oakes v. United States*, 872 F. Supp. 817, 824 (E.D. Wash. 1994) ("[T]he forfeiture statute subsumes all of section 841(a)(1) and, therefore, renders the criminal conviction, and the civil forfeiture the 'same offense' as defined by *Blockburger*").

612. 432 U.S. 137 (1977).

613. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1217-18 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom.*, *United States v. Ursery*, 116 S.Ct. 762 (1996), *rev'd* 116 S.Ct. 2135 (1996).

614. *Jeffers*, 432 U.S. at 147-51.

615. *\$405,089.23 U.S. Currency*, 33 F.3d at 1218 (emphasis added). In *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994), the Ninth Circuit, without much analysis, cited *Blockburger* and *Dixon* and stated, "unless the civil forfeiture under § 881(a)(4) can be predicated upon some offense other than those for which [the claimant] has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause." *Id.* at 495.

. . . and a fortiori their underlying elements, would therefore be contained within § 881(a) as lesser included offenses of the forfeiture 'offense' and thus, "such an offense may not be prosecuted once a jeopardy for the lesser included offense has occurred."<sup>616</sup> In 9844 *South Titan Court*, the government contended that since *theoretically* "forfeiture . . . need not be based on any particular past offense by a particular claimant," it did not punish the "'same offense' . . ."<sup>617</sup> The Tenth Circuit, however, finding such thinking to be flawed, pointed out that *Blockburger* neither condones ignoring the *actual* facts on which prosecutions are based nor excuses the "particular case . . . based squarely on . . . a past offense."<sup>618</sup>

According to the Tenth Circuit, the statute and the reality have to cooperate in a *Blockburger* analysis. The court thus formulated the rule to be that "where commission of one of a certain class of offenses is a necessary element of another offense, and where the identical conduct or unit of prosecution is the factual basis of both, each offense within the class is a 'species of lesser included offense' in relation to the greater offense."<sup>619</sup>

Only the Tenth Circuit dealt with *Brown v. Ohio*,<sup>620</sup> which was indeed a "fair analogue."<sup>621</sup> In *Brown*, the Supreme Court found that joyriding was a lesser included offense of auto theft and thus, both offenses were the same under a *Blockburger* analysis. The *Brown* Court explained that "[t]he prosecutor who has established joyriding need only prove the requisite intent in

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616. United States v. 9844 S. Titan Court, 75 F.3d 1470, 1490 (10th Cir. 1996).

617. *Id.*

618. *Id.* See generally James A. Shellenberger & James A. Strazzela, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 8-13 (1995) (discussing the three basic approaches to the lesser included offense determination: the statutory elements approach, the pleadings approach and the evidence approach). According to Shellenberger and Strazzela, under the "evidence approach . . . the examination is not simply of abstract statutory elements or even crimes suggested by the pleadings, but the crimes that the trial evidence tends to prove." *Id.* at 12.

619. 9844 S. Titan Court, 75 F.3d at 1490 (citing *Illinois v. Vitale*, 447 U.S. 410, 421 (1980)). The Tenth Circuit also relied on *Harris v. Oklahoma*, 433 U.S. 682 (1977), in which the Court held that the felony murder conviction barred prosecution for the underlying felony of robbery, and *Whalen v. United States*, 445 U.S. 684, 694 n.8 (1980), in which the Court held that *Blockburger* statute made rape a lesser included offense within felony murder. 9844 S. Titan Court, 75 F.3d at 1490.

620. 432 U.S. 161 (1977).

621. United States v. 9844 S. Titan Court, 75 F.3d at 1490. See also Dallet, *supra* note 9, at 255 who points out that "a drug law violation required by § 881 can be likened to a 'lesser included offense' within § 881 and would constitute the same offense under *Blockburger*" and applies *Brown*.



order to establish auto theft."<sup>622</sup> Similarly, in the § 881 forfeiture context, once the government obtains the conviction for the predicate drug offense, it need only show that the property was used or intended to be used in the violation.<sup>623</sup> As such, the different degrees of scienter and forfeiture's implication of the property in the crime, like the different requisite intent in *Brown*, does not make the criminal violation into something other than a lesser included offense.

Stephen McClain, one of the few commentators to seriously grapple with the *Blockburger* test in this context, has concluded that "summarily assuming § 881 punishes for the same offenses as, or is a greater offense of, the criminal drug statutes is unwise."<sup>624</sup> McClain advocates giving the "government . . . the opportunity to prove that it is predicated the forfeiture claim on a claim 'separate' and different from any charges being criminally prosecuted."<sup>625</sup> The issue that McClain raises becomes essentially its own tempest in a tea pot or something that simply percolates into an unremarkable epithet that where there is no double jeopardy, there is no double jeopardy. In fact, the Ninth Circuit decision in *United States v. Chick*<sup>626</sup> illustrates this.

In *Chick*, the government sought forfeiture of seized equipment under 18 U.S.C. § 2513 because it was allegedly used to intercept electronic communications in violation of 18 U.S.C. § 2511.<sup>627</sup> Also, a grand jury indicted Chick and his sister for engaging in a "conspiracy to 'assemble, possess and sell' satellite descrambler modules that allowed the descrambling of certain

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622. 432 U.S. at 167. See also *Harris v. Oklahoma*, 433 U.S. 682, (1977) (per curiam) (holding that a defendant could not be tried for felony murder after he was convicted of the lesser included offense of robbery).

623. See Dallet, *supra* note 9, at 255 ("Just as the prosecutor who had established joyriding need only to prove mens rea to establish auto theft in *Brown*, the prosecutor who established a violation of the drug laws through a conviction need only establish the property was used or intended to be used in the violation of the drug laws for forfeiture under § 881.").

624. McClain, *supra* note 119, at 972. McClain points out that "the government need not prove a violation of the controlled substance statutes to obtain forfeiture in every case." *Id.* at 968 (footnote omitted). As an example, McClain gives the forfeiture of property "intended" to be used to commit or facilitate an offense. *Id.* In such cases, "the government could obtain forfeiture without proving an actual criminal violation . . ." *Id.* Also, McClain points out that forfeiture may be predicated on the acts of a party other than the defendant. *Id.* at 971. Under such circumstances, however, the same individual is not in jeopardy more than once.

625. *Id.* at 972-73.

626. 61 F.3d 682 (9th Cir. 1995).

627. *Id.* at 684.

television programming without payment of subscription fees.<sup>628</sup> Chick himself was charged in an initial and superseding indictment with selling illegal descrambler units.<sup>629</sup> Chick sought a dismissal of the criminal charges, arguing that the prior civil forfeiture barred the criminal prosecution.<sup>630</sup>

In agreeing with the district court that the civil forfeiture and the impending prosecution were not based on the same offenses, the Ninth Circuit elaborated:

The civil forfeiture proceeding only required proof that the seized electronic equipment was used to intercept electronic communications in violation of 18 U.S.C. § 2511. The civil forfeiture proceeding did not require proof that Chick conspired to assemble, possess or sell satellite descrambler modules or that Chick sold illegally modified satellite descramblers.<sup>631</sup>

In *Chick*, not only were the indictment counts "distinctly different"<sup>632</sup> from the predicate forfeiture offense, but also the Supreme Court decision in *United States v. Felix*<sup>633</sup> trumped Chick's double jeopardy challenge. The Ninth Circuit recited the language in *Felix* that "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause."<sup>634</sup> The Ninth Circuit thus felt that *Felix* authorized the forfeiture of Chick's equipment as well as a later prosecution of Chick for conspiring to use the equipment to violate the law.<sup>635</sup>

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628. *Id.*

629. *Id.*

630. *Id.*

631. *Id.* at 687.

632. *Id.*

633. 503 U.S. 378 (1992).

634. *Chick*, 61 F.3d at 688 (quoting *Felix*, 503 U.S. at 380-81).

635. *Id.* See also *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160, 1171 (3d Cir. 1995) (While "[c]onviction on the criminal charges required proof . . . [of] participat[ion] in a conspiracy or that he possessed a controlled substance[,] . . . forfeiture under § 881(a)(6) did not require proof of either of these elements."); *Crowder v. United States*, 874 F. Supp. 700, 703 (M.D.N.C. 1994) (although "it is possible that the conspiracy mentioned in Count Two with respect to money laundering may have had some connection with the money which was forfeited [,] . . . as the government points out, petitioner was convicted of conspiracy, not the actual money laundering."), *aff'd* 69 F.3d 534 (4th Cir. 1995); *United States v. Shorb*, 876 F. Supp. 1183, 1187 (D. Or. 1995) ("The government makes a more compelling point with its argument that the convictions and the forfeitures pertain to different offenses because the prosecutions involved charges of conspiracy and money laundering, while the forfeiture cases did not."), *aff'd in part, vacated in part* 59 F.3d 177 (9th Cir. 1995).

Although the *Chick* decision could be perceived, almost as a matter of reflex, as somewhat alarming because it seemingly eroded what the Ninth Circuit built in *\$405,089.23 U.S. Currency*, that was not really the case. In *Chick*, unlike the more typical § 881 forfeiture, the government did not predicate the confiscation of the property on the identical offenses in the indictment.<sup>636</sup> In fact, as a matter of speculation, it was perhaps that lack of sameness that belied the government's failure to pursue its more routine ploy of first obtaining the conviction for use in obtaining a subsequent summary forfeiture judgment. The message of *Chick* thus really is that when offenses are not the same, there is no double jeopardy impasse. This, like the proposition in *Torres* that there is no double jeopardy where the defendant was not ever a party to the separate civil forfeiture proceeding,<sup>637</sup> might be considered unearthshakingly apodictic.

In short, the best rule here is one purged of myths. Put quite simply, double jeopardy should apply when the civil forfeiture punishes the same individual for the same offense as, or for the lesser included offense of, the charged violation in the parallel criminal case.

#### V. THE SUPREME COURT'S DESTRUCTIVE APOTHEOSIS OF THE ARCHAIC FORFEITURE MYTHS AND DEROGATION OF THE DOUBLE JEOPARDY CLAUSE

One of the things that is disturbing about the Supreme Court's consolidated decision in *Ursery* and *\$405,089.23 United States Currency*<sup>638</sup> is that it recklessly undoes the advancements that the Court made in *Halper*<sup>639</sup>, *Austin*<sup>640</sup> and *Kurth Ranch*<sup>641</sup>. Even more troubling, however, is the Court's dogged adherence to mere labels and its resurrection and ultimate apotheosis of the archaic forfeiture myths. The ultimate effect is not merely

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636. See also *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1488 (10th Cir. 1996) ("we agree that basing forfeiture on previous conduct for which Mr. May was never indicted cannot constitute double jeopardy."); *United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995) (forfeiture proceeding punished Rhodes for the sale of drugs other than those that were the subject of the criminal case); *United States v. \$292,888.04 In U.S. Currency*, 54 F.3d 564, 568-69 (9th Cir. 1995) (forfeiture of funds under currency reporting statute was different from the claimant's criminal convictions, which were based on drug importation).

637. See discussion of *Torres* *supra* Part IV.A.2.

638. 116 S. Ct. 2135 (1996).

639. 490 U.S. 435 (1989).

640. 509 U.S. 602 (1993).

641. 511 U.S. 767 (1994).

the derogation of stare decisis but the enfeebling of a crucial Constitutional protection.

A. *The Supreme Court's Decision in United States v. Ursery and United States v. \$405,089.23 U.S. Currency*

In *Ursery* and *\$405,089.23 U.S. Currency*, Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer joined.<sup>642</sup> In concluding that civil forfeitures generally do not constitute punishment within the meaning of the Double Jeopardy Clause, the Court took four steps in what can only be described as "putative" reasoning.

First, the Court looked back to "the earliest years of this Nation" and found that there has always been congressional approval of parallel in rem civil forfeiture actions and criminal prosecutions based upon the same underlying events.<sup>643</sup> In the course of this backward glance, the Court returned to that "long line of cases" in which it had deemed the Double Jeopardy Clause to be inapplicable to such forfeiture actions.<sup>644</sup>

In this regard, the *Ursery* Court's real fixation was *Various Items of Personal Property v. United States*,<sup>645</sup> in which the Court hinged its conclusion that the Double Jeopardy Clause was inapplicable to the forfeiture of a distillery, warehouse and denaturing plant on the "sharp distinction" between in rem and in personam penalties.<sup>646</sup> Essentially the *Various Items* Court blanketly determined that only those penalties labeled "in personam" could be punitive in nature.<sup>647</sup>

The Court in *Ursery* and *\$405,089.23 U.S. Currency* went beyond merely rubber stamping *Various Items*, but in an ostensible hyperbole, explained that had the Court in *Various Items* reached any other result it would have been "quite remarkable."<sup>648</sup> According to the present Court, what the *Various Items* Court acknowledged was that "[a]t common law, in many cases, the right of forfeiture did not attach until the offending person had been convicted and the record of conviction produced."<sup>649</sup> Thus, the prior conviction did not trigger a double jeopardy

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642. 116 S. Ct. 2135 (1996).

643. *Id.* at 2140.

644. *Id.*

645. 282 U.S. 577 (1931). See *supra* text accompanying notes 146-49.

646. *Ursery*, 116 S. Ct. at 2141.

647. *Various Items*, 282 U.S. at 581.

648. *Ursery*, 116 S. Ct. at 2141.

649. *Id.* (quoting *Various Items*, 282 U.S. at 580).

problem, but conversely became the very prerequisite to the civil forfeiture. According to the Court, the fact that forfeiture is a statutory creation which renders the common-law rule inapplicable does not mean that "the Constitution prohibit[s] for statutory civil forfeiture what was required for common-law civil forfeiture."<sup>650</sup>

Second, the Court dwelled on the "two-part analytical construct" it used in *One Assortment of 89 Firearms*<sup>651</sup> to determine that a prior criminal proceeding did not bar the forfeiture action.<sup>652</sup> In so doing, the Court extracted what it described as a "remarkably consistent theme"—namely, that "in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause."<sup>653</sup>

Third, the Court considered the *Halper*, *Austin* and *Kurth Ranch* trilogy and whether it constituted an abandonment of *Various Items* and *One Assortment Of 89 Firearms*. Through an excessive narrowing of all three cases, the Court disposed of *Halper* by reciting that it did not deal with a civil forfeiture—but instead with just a civil penalty.<sup>654</sup> According to the Court, the *Halper* focus was not on any ligature between civil forfeiture and civil penalties, but rather on the supposed historically drawn demarcation between the two.<sup>655</sup> The distinction, according to the Court, basically boiled down to forfeiture having an "in rem" label and a civil penalty having an "in personam" label.<sup>656</sup>

Specifically, the Court explained that the *Halper* approach, which is the "case-by-case balancing test" where courts must "compare the harm suffered by the Government against the size of the penalty imposed," can not fit civil forfeiture.<sup>657</sup> According to the court, civil forfeiture has a unique quantification problem: while it is literally possible to quantify the value of the forfeited property, it is not possible to even approximate "the nonpunitive purposes served by a particular civil forfeiture."<sup>658</sup> In fact, the Court saw *Kurth Ranch* as an analogous recognition of the quantification problem when it proclaimed that "*Halper's*

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650. *Id.*

651. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

652. *Ursery*, 116 S. Ct. at 2141-42.

653. *Id.*

654. *Id.* at 2144.

655. *Id.*

656. *Id.*

657. *Id.* at 2145.

658. *Id.*

method of determining whether the exaction was remedial or punitive simply does not work [outside of a fixed civil penalty context or] in the case of a tax statute."<sup>659</sup>

In truth, the Court pushed *Kurth Ranch* aside simply because it was called a tax proceeding and not an in rem forfeiture. Similarly, the Court relegated *Austin* to the Excessive Fines Clause of the Eighth Amendment and declined to extend it to a double jeopardy context. Because of that distinction, the Court specifically rejected the interpretation of the circuit courts below that concluded that *Austin* supplanted the *Halper* ad hoc approach.

Also, as the Court saw it, in an Excessive Fines Clause analysis, the second tier of inquiry is whether the sanction is so large as to be considered "excessive."<sup>660</sup> As the Court reasoned, that second tier would needlessly duplicate the preliminary *Halper* question of "whether the civil sanction imposed in that particular case is totally inconsistent with any remedial goal."<sup>661</sup> Consequently, the *Austin* Court's rejection of the *Halper* test did not mean that forfeiture is punitive per se, only that the *Halper* test would be redundant and thus, unworkable in an Eighth Amendment context.

Fourth, the Court, treating *Halper*, *Austin* and *Kurth Ranch* as essentially non-existent, dove right into the good old *One Assortment Of 89 Firearms*' analysis<sup>662</sup> and initially found that "Congress intended these forfeitures to be civil . . . ." <sup>663</sup> Then the Court, importing the *Ward* test, found "little evidence . . . suggesting that forfeiture proceedings under 21 U.S.C. § 881(a)(6) and (a)(7), and 18 U.S.C. § 981(a)(1)(A), are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary."<sup>664</sup> In fact, the Court found such forfeiture statutes to be virtually indistinguishable from those in *Various Items*, *Emerald Cut Stones* and *One Assortment Of 89 Firearms*.<sup>665</sup>

The heart of this fourth step was the Court's apparent fascination with what it called the "important nonpunitive goals" of the forfeiture provisions at issue.<sup>666</sup> As the Court elaborated, the confiscation of *Ursery's* realty served to compel property owners

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659. *Id.* at 2146.

660. *Id.*

661. *Id.*

662. See *supra* text accompanying notes 135-37.

663. *Ursery*, 116 S. Ct. at 2147.

664. *Id.* at 2148.

665. *Id.*

666. *Id.*

to be prudent in the management of their property and ensured that such owners do not let their property be used for illegality.<sup>667</sup> The forfeiture of the Arlt and Wren property had the added benefit of preventing persons from profiting from their unlawful acts.<sup>668</sup> Such benefits, according to the Court, supplanted the punitive aspects of the forfeiture provisions at issue.

In its summation, the Court paid homage to the "long tradition of federal statutes providing for a forfeiture proceeding following a criminal prosecution."<sup>669</sup> It also stressed that in forfeiture proceedings, the Government does not have to establish scienter and it can confiscate property even if no party claims it and even if there is no demonstrated nexus between the property and a particular person.<sup>670</sup> Moreover, the innocent owner provision, according to the court, was simply not relevant to whether a statute is punitive under the Double Jeopardy Clause.<sup>671</sup> Further, the deterrent purpose of the statutes and the fact that they are tied to criminal activity make them neither criminal nor punitive.<sup>672</sup>

### B. *The Concurring Opinions*

Justices Kennedy and Scalia authored separate concurring opinions. Justice Kennedy strained to extricate the decision in *Ursery* and \$405,089.23 *U.S. Currency* from language in the *Austin* and *Libretti* decisions. He acknowledged that in *Austin* the Court "described the civil in rem forfeiture provision . . . at issue . . . as punitive."<sup>673</sup> He also acknowledged that in *Libretti*, which involved an "almost identical" criminal forfeiture statute, the Court deemed the "'fundamental nature of criminal forfeiture'" to be punishment.<sup>674</sup>

According to Justice Kennedy, however, the Double Jeopardy Clause protects a person and because civil in rem forfeiture is indeed in rem, it does not punish a person.<sup>675</sup> Consequently, according to Kennedy it is the in rem and in personam nomenclature that eliminates what he believed was merely a su-

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667. *Id.*

668. *Id.*

669. *Id.* at 2149.

670. *Id.*

671. *Id.*

672. *Id.*

673. *Id.* at 2149 (Kennedy, J., concurring).

674. *Id.*

675. *See id.*

perfidious contradiction between the present decision and the *Austin-Libretti* precedent.

Despite his self-professed blind faith in the in rem fiction, Justice Kennedy sporadically pressed what is essentially the contrary view—that “[f]orfeiture . . . punishes *an owner* by taking property involved in a crime and it may happen that the owner is also the wrongdoer charged with a criminal offense.”<sup>676</sup> Justice Kennedy putatively reasoned, however, that it does not follow from this concession that “forfeiture is . . . a second in personam punishment for the offense . . .” because “[c]ivil in rem forfeiture has long been understood as independent of criminal punishments.”<sup>677</sup>

As explained below, it is quite telling that Justice Kennedy insistently denied that the Court was reviving the guilty property fiction. Also, in criticizing Justice Stevens’ reliance on a “misfit,”<sup>678</sup> the same-elements test of *Blockburger*, Justice Kennedy, summoning up the notion of guilty property, added that “[t]he forfeiture cause of action is not charging a second offense of the person; it is a proceeding against the property in which proof of a criminal violation by any person will suffice, provided that some knowledge of or consent to the crime on the part of the property owner is also established.”<sup>679</sup>

Justice Kennedy also questioned the real utility of the two-party inquiry in *One Assortment Of 89 Firearms* because it did not “add[] much to the clear rule of *Various Items* that civil in rem forfeiture of property involved in a crime is not punishment subject to the Double Jeopardy Clause.”<sup>680</sup> To him, the answers are unremarkably concrete and rest on labels: namely, in rem proceedings are synonymous with civil proceedings and the forfeiture of property used in a crime is always remedial.

Justice Scalia, with whom Justice Thomas joined, briefly concurred to reiterate the germ of his *Kurth Ranch* dissent, that “the Double Jeopardy Clause prohibits successive prosecution, not successive punishment.”<sup>681</sup> In dealing with this, however, he took it nowhere by stating that such civil forfeiture proceedings do not constitute criminal prosecutions.<sup>682</sup>

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676. *Id.* at 2150 (emphasis added).

677. *Id.*

678. *Id.* at 2151.

679. *Id.*

680. *Id.*

681. *Id.* at 2152 (Scalia, J., concurring). See also *supra* Parts II.C.2 & II.C.3.

682. *Id.*



C. *Justice Stevens' Concurrence and Dissent*

Justice Stevens concurred in the Court's disposition of \$405,089.23 U.S. Currency because the forfeited property constituted proceeds from the unlawful activity. According to Stevens, proceeds' forfeiture is different because the property is not something the owners have any right to retain.<sup>683</sup> He also agreed with the Court's explanation of why the forfeiture of contraband does not constitute punishment for double jeopardy purposes.<sup>684</sup>

In dissenting, however, Justice Stevens faulted the Court for "show[ing] a stunning disregard not only for modern precedents but for our older ones as well."<sup>685</sup> The first of many things that irked Justice Stevens was the Court's reliance on *Various Items*.<sup>686</sup> As Stevens pointed out, *Various Items* vanished almost as swiftly as it came: "[the Court] cited that case in only two decisions over the next seven years, and never again in nearly six decades."<sup>687</sup> In fact, the two cases that purportedly "affirmed" *Various Items*—*One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms*—never even mentioned *Various Items*.

Further, Stevens declined to read the putative *Various Items*' progeny as espousing a "categorical rule that civil forfeitures never give rise to double jeopardy rights."<sup>688</sup> As he saw those cases, they were indeed more ad hoc, with each "carefully consider[ing] the nature of the particular forfeiture at issue, classifying it as either 'punitive' or 'remedial', before deciding whether it implicated double jeopardy."<sup>689</sup>

Second, Stevens was disturbed by the Court's failure to recognize the real ramifications of *Boyd v. United States*,<sup>690</sup> a decision in which the Court applied other constitutional protections to forfeitures that had a punitive element. In *Boyd*, the Court deemed the Fourth Amendment and the Fifth Amendment's Self-Incrimination Clause to forbid the compulsory production of an individual's private papers for use in a proceeding to forfeit his property for alleged fraud against the revenue laws.<sup>691</sup> Because the Double Jeopardy Clause and the Self-Incrimination

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683. *Id.* (Stevens, J., concurring in part and dissenting in part).

684. *Id.*

685. *Id.* at 2153.

686. *Id.*

687. *Id.* at 2154.

688. *Id.*

689. *Id.*

690. 116 U.S. 616 (1886).

691. *Id.* at 633.

Clause are housed in the same amendment, they should be interpreted "*in pari materia*."<sup>692</sup> Moreover, as Justice Stevens pointed out, the Double Jeopardy Clause should have the broader application because it refers to "jeopardy" and unlike the Self-Incrimination Clause, does not expressly confine itself to a "criminal case."<sup>693</sup>

Third, Justice Stevens accused the majority of "mis-read[ing]" *Halper*, *Austin* and *Kurth Ranch* through excessive narrowing and the persistent failure to see them as collectively having an impact on the law.<sup>694</sup> According to Stevens, the cases comprised a trilogy "devoted to the common enterprise of giving meaning to the idea of 'punishment,' a concept that plays a central role in the jurisprudence of both the Excessive Fines Clause and the Double Jeopardy Clause."<sup>695</sup>

In particular, in Steven's view, *Austin* can not be dismissed as a mere excessive fines case because *Austin* reaches further and logically congeals with *Halper*.<sup>696</sup> In *Austin*, "[t]here [was] no need to determine whether a statute that is punitive by design has a punitive effect when applied in the individual case."<sup>697</sup> The reason the approach in *Halper* was different was because the sanction in *Halper* was not always punitive in character but could nevertheless have some nonpunitive applications. In fact, in *Kurth Ranch* the Court took the same approach that it had taken in *Austin*, reasoning that the tax had an "unmistakable punitive character" that rendered it punishment in *all* of its applications.<sup>698</sup>

Justice Stevens' main gripe, however, with the Court's treatment of *Austin* was basically its flagrant disregard for its own precedent:

Remarkably, the Court today stands *Austin* on its head—a decision rendered only three years ago, with unanimity on the pertinent points—and concludes that § 881(a)(7) is remedial rather than punitive in character. Every reason *Austin* gave for treating § 881(a)(7) as punitive—the Court rejects or ignores. Every reason the Court provides for treating § 881(a)(7) as remedial—*Austin* rebuffed. The Court claims that its conclusion is consistent with decisions reviewing statutes 'indistinguishable' 'in most significant respects' from § 881(a)(7) . . . but ignores the fact

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692. *Ursery*, 116 S. Ct. at 2155.

693. *Id.* at 2155 n.3.

694. *Id.* at 2156.

695. *Id.*

696. *Id.* at 2157.

697. *Id.*

698. *Id.* (emphasis added).

that *Austin* reached the opposite conclusion as to the *identical* statute under review.<sup>699</sup>

For Stevens, there was no basis for distinguishing between the forfeiture of the house in the present case and the forfeitures in the *Austin* case in which the Court rejected the contention that the mobile home and body shop were "instruments" of drug trafficking.<sup>700</sup> Stevens also could not square the majority's description of the statutes as deterrent with the *Halper*, *Austin* and *Kurth Ranch* premise that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."<sup>701</sup>

In addition, Stevens pointed out the inconsistency between the Court's depiction of the statute as having no scienter requirement and the reasoning in *Austin*. With respect to property that no one claims, it is simply deemed abandoned and of course the government can forfeit it. As Justice Stevens pointed out, in such a situation scienter is simply not an issue.<sup>702</sup> But if the government is seeking to confiscate property that someone does claim, it has to establish culpability because of the "innocent owner" exemption.<sup>703</sup> What Justice Stevens emphasized was that the innocent owner provision was in fact pivotal to the *Austin* Court's determination that such forfeiture is punitive in nature.<sup>704</sup> Similarly, in Stevens' view, the Court's announcement that the statutory tie to criminal activity is not enough to make it punitive conflicted with the completely contrary assessment in *Austin*.<sup>705</sup>

Fifth, Justice Stevens was disturbed with the "recurrent theme of the Court's opinion . . . that there is some mystical difference between in rem and in personam proceedings."<sup>706</sup> For him, that collided with the Court's repeated rejection of the notion that mere labels or the nature of the court's jurisdiction determines what constitutional protections apply.<sup>707</sup> As Justice Stevens saw it, what belied that "recurrent theme" was the Court's

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699. *Id.* at 2158.

700. *Id.* at 2158-59.

701. *Id.* at 2159 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1988)).

702. *Id.*

703. *Id.*

704. *Id.*

705. *Id.*

706. *Id.*

707. *Id.* at 2159-60.

adherence to the "notorious" guilty property fiction.<sup>708</sup>

Finally, Justice Stevens reached out and dealt with the government's other arguments. With respect to the *Blockburger* test, it barred the *Ursery* conviction "because the elements that the Government was required to allege and prove to sustain the forfeiture of *Ursery's* home under § 881(a)(7) included each of the elements of the offense for which he was later convicted."<sup>709</sup> Further, Stevens found the government's argument that the forfeiture and criminal conviction occurred in the same proceeding to be "unpersuasive because it is simply inaccurate to describe two separate proceedings as one."<sup>710</sup> For Justice Stevens, the Double Jeopardy Clause requires "a single judgment encompassing the entire punishment for the defendant's offense."<sup>711</sup>

#### D. *The Destructive Apotheosis*

The decision in *Ursery* and \$405,089.23 *U.S. Currency* dismantled the cumulative advancement of *Halper*, *Austin* and *Kurth Ranch*. Specifically, the main thrust of *Halper* is that the legislative labels of "civil" and "criminal" are not "of paramount importance."<sup>712</sup> In fact, it is the *Halper* Court's toppling of such labels that underlies its decision to deal with reality by individually assessing the actual impact a civil sanction has on an individual who has already been criminally punished for the same offense.

In *Ursery* and \$405,089.23 *U.S. Currency*, the Court leaped right back to the inquiry in *One Assortment of 89 Firearms* and *Ward* as if the *Halper* test had never been born. It, in fact, chanted the old dirge, which initially involves deference to Congress' decision to name a mechanism as a "remedial civil sanction."<sup>713</sup> After that preliminary inquiry, the Court deemed the second question to be whether the challenger can "establish by the 'clearest proof' that Congress [had] provided a sanction so punitive as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'"<sup>714</sup>

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708. *Id.* at 2160.

709. *Id.* at 2162. See discussion *supra* Part IV.C.

710. *Id.* at 2162.

711. *Id.*

712. *United States v. Halper*, 490 U.S. 435, 447 (1989) ("It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.").

713. *Ursery*, 116 S. Ct. at 2137.

714. *Id.* at 2142 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984)).

The problem is that any chance that a forfeiture provision can get beyond that second "clearest proof" hurdle dies in the *Ursery* and \$405,089.23 *U.S. Currency* decision. Basically the Court indicated that an individual assessment of the punitive effect of a forfeiture penalty is not necessary because there is a forgone conclusion that such a penalty is a "separate civil sanction" and that it is "remedial in nature."<sup>715</sup> In essence, the Court, paying mere lip service to the supposed second tier of analysis, actually empowered the first tier with ability to completely imbibe the latter. That is, in forfeiture proceedings Congress named the mechanism "civil" and "remedial" and thus, there can never be that "clearest proof" that forfeiture is anything other than "civil" and "remedial." All this reasoning really winds back to the reactionary proclamation that the Congressional name is once again the sole despot.

As Justice Stevens pointed out, however, that despot apparently did not preside over the reasoning in *Boyd*, in which the Court applied constitutional protections to such a forfeiture proceeding. In fact, the *Boyd* case involved the Self-Incrimination Clause which has an explicitly "criminal" label, yet the Court let that Clause reach into the civil domain. Justice Stevens, in revealing the Court's illogic, explained that if anything, the Double Jeopardy Clause, which covers "any type of jeopardy" should embrace an even "larger class of situations."<sup>716</sup> What the *Ursery* and 405,089.23 *U.S. Currency* decision shows is that the Court will revert to label worship when it conveniently provides it with the desired escape hatch.

Another aspect of the Court's deification of mere labels is the way it chose to distinguish the *Halper*, *Austin* and *Kurth Ranch* decisions. For the Court, the meaningful distinction between *Halper*, *Austin* and *Kurth Ranch* and the case sub judice goes back to names. Specifically, the Court stressed that the problem in *Halper* was different because it was not something called "forfeiture" but instead was something that had "a civil penalty" name.<sup>717</sup> In *Austin*, the crucial difference was its involvement of a constitutional protection in the name of "Excessive Fines" punishment not "Double Jeopardy" punishment.<sup>718</sup> Similarly, the Court relegated *Kurth Ranch* to near oblivion because the penalty in that case was named a "tax" and not a "for-

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715. *Id.*

716. *Id.* at 2155 n.3 (Stevens, J., concurring in part and dissenting in part).

717. *Id.* at 2144.

718. *Id.* at 2146.

feiture.<sup>719</sup> The approach in this regard is vaguely reminiscent of the somewhat puerile law student quip that distinguishes two clone cases on the ground that the respective defendants have different names.

The superficial silliness of this name game, however, is not the real problem here. The true devastation issues from the Court's basic shunning of reality or disregard for the real effect a sanction or confiscation of property has on the individual target. As the *Halper* Court pointed out, the Double Jeopardy Clause is sacred because it protects "humane interests," which are "intrinsically personal."<sup>720</sup> Any double jeopardy test which hinges solely on Congress' choice of which name to slap on a provision can not tap into what really matters—the real exaction of something "intrinsically" and perhaps inhumanely personal—that is, redundant pain.

Further, in *Ursery* and *\$405,089.23 U.S. Currency*, the Court pulverized the *Austin* decision. As discussed above, the bottom line proposition of *Austin* could not be more unequivocal: it states that *all* forfeiture is punishment. Contrary to the Court's insistence in *Ursery* and *\$405,089.23 U.S. Currency*, the per se rule did not ensue from some exclusive Excessive Fine Clause context, but rather from the Court's historical analysis of the punitive character of civil in rem forfeiture and its interpretation of the specific punitive forfeiture provisions before it. It is thus not the Eighth Amendment that makes forfeiture punitive but something about forfeiture itself that simply *is* punitive.<sup>721</sup>

In fact, the Court's attempt to deny the existence of any bridge between the *Halper* and *Austin* decisions negates the real substance of *Austin*. As discussed above, what the *Halper* Court constructed was a case-by-case double jeopardy analysis, one that ensures that a potentially punitive civil judgment imposed on an already criminally punished defendant is rationally related to the goal of making the government whole. According to the Court in *Ursery* and *\$405,089.23 U.S. Currency*, its failure to track the *Halper* approach in *Austin* was not due to the *Austin* Court's understanding that the test does not work when the provision is per se punitive.<sup>722</sup> Instead, the reason the *Austin* Court did not use the "case-by-case approach of *Halper*" was because "a preliminary-stage inquiry that focused on the disproportionality of a particular sanction would be duplicative of the exces-

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719. *Id.* at 2147.

720. *United States v. Halper*, 490 U.S. 435, 447 (1989).

721. See *supra* Part II.B.2.

722. *Ursery*, 116 S. Ct. at 2146.

siveness analysis that would follow."<sup>723</sup> What is blatant here in such rationalizing is the missing chunk.

The missing chunk is not something peripheral, but precisely what the *Austin* Court isolated as *the* seminal question—whether forfeiture constituted punishment. In rejecting the government's contentions in *Austin*, the Court stressed that the basic purpose of the Eighth Amendment was to limit the government's power to punish and reiterated the *Halper* language that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."<sup>724</sup> Consequently, the real crux of *Austin* was not some excessiveness analysis that would conceivably duplicate the "preliminary-stage" disproportionality inquiry of *Halper*, but *was* the very issue in *Halper*—punishment.

The *Austin* Court, recognizing that punishment is not inherently homogeneous, stressed that "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence."<sup>725</sup> In so doing, the Court described forfeiture as a mottled mechanism, a remedial, deterrent and punitive amalgam which nevertheless—under the reasoning in both *Halper* and *Austin*—amounts to punishment.

In *Ursery* and \$405,089.23 *U.S. Currency*, the Court dwelled on what it depicted as the "non-punitive purposes" of the forfeiture provisions and posited that because such things defied quantification, the *Halper* disproportionality test was unworkable.<sup>726</sup> As Justice Stevens aptly pointed out, however, there is no way that that line of reasoning can coexist with the proclamation in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment [within the meaning of the Double Jeopardy Clause]."<sup>727</sup> Stated otherwise, if anything with a smattering of the nonpunitive can be exempt from undergoing the *Halper* punishment test, then basically any punishment can be deemed nonpunishment. This is, in truth, the Court's cavalier eradication of the *Halper* test or more disturbingly, the erasure of its own precedent.

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723. *Id.*

724. *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *Halper*, 490 U.S. at 447-48).

725. *Id.* at 622 n.14.

726. *Ursery*, 116 S. Ct. at 2145.

727. *Id.* at 2156 (Stevens, J., concurring in part and dissenting in part) (quoting *United States v. Halper*, 490 U.S. 435, 448-49 (1989)).

As discussed above, another progressive feature of *Austin* was its extirpation of the guilty property myth.<sup>728</sup> The *Austin* Court, like the outspoken child who shouted that the King was naked, revealed forfeiture for what it really is—the punishment of a culpable property owner. Justice Stevens correctly diagnosed the Court's "pedantic distinction between in rem and in personam actions" as a "cover" for what was the Court's real reliance on the "notorious fiction."<sup>729</sup>

This guilty property fiction is more than the hub of the Court's "recurrent theme": it, in fact, obsessively infiltrates every facet of the *Ursery* and \$405,089.23 *U.S. Currency* decision. In offering its supposed monolith of support, the Court used *Various Items* as its foundation and recited the *Various Items*' language that the property is the defendant "as though it were conscious instead of inanimate and insentient."<sup>730</sup> In distinguishing *Halper*, the Court underscored the historical distinction between civil penalties imposed on people and the in rem proceedings in which property is "held guilty and condemned."<sup>731</sup> In ascertaining Congressional intent, the Court explained that "Congress specifically structured these forfeitures to be impersonal by targeting the property itself."<sup>732</sup>

While in his concurrence Justice Kennedy purported to refute Justice Stevens' accusation that revival of the guilty property fiction belied the Court's distinction between in rem and in personam punishments, wrongdoing objects drift in and out of Justice Kennedy's reasoning as well. That is, Justice Kennedy similarly asserted that "civil in rem forfeiture is not punishment of the wrongdoer for his criminal offense" and re-echoed the platitudinous guilty property language in *Various Items*.<sup>733</sup>

Even Justice Kennedy's acknowledgment that "[i]t is the owner who feels the pain and receives the stigma of the forfeiture . . ." is filled with a "doth protest too much" tone, which ultimately culminates in his clinging to the notion of guilty property.<sup>734</sup> Specifically, when trying to brush aside Justice Stevens' *Blockburger* analysis as a "misfit," Justice Kennedy resorted to the explanation that the forfeiture defendant is the property

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728. See *supra* Part II.B.2.

729. *Ursery*, 116 S. Ct. at 2160 (Stevens, J., concurring in part and dissenting in part).

730. *Id.* at 2149 (quoting *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931)).

731. *Id.* at 2140 (quoting *Various Items*, 282 U.S. at 580-81).

732. *Id.* at 2147.

733. *Id.* at 2149 (Kennedy, J., concurring).

734. *Id.* at 2151.



and "[t]he forfeiture cause of action is not charging a second offense of *the person*."<sup>735</sup>

In *Ursery* and \$405,089.23 *U.S. Currency*, the Court did not just revitalize and deify the old forfeiture myths that traditionally kept double jeopardy protection at bay, it made matters worse by effectually putting the Circuit Courts' replacement myths on hold. As discussed above, after *Halper*, *Austin* and *Kurth Ranch*, the federal appellate courts hatched some surrogate myths to fend off constitutional protection.<sup>736</sup> Specifically, certain courts concocted a way to get around double jeopardy protection by mythically portraying the separate civil and criminal proceedings as not necessarily separate.<sup>737</sup> In expressly declining to address or invalidate that theory, the Court in *Ursery* and \$405,089.23 *U.S. Currency*, in effect, kept the myth alive in the deep freeze—in abeyance so to speak.

Also as discussed above, after *Halper*, *Austin* and *Kurth Ranch*, the government tried to defeat the double jeopardy impasse by arguing that the criminal conviction and the civil forfeiture were not the same offense.<sup>738</sup> As explained above, one of the government's putative *Blockburger* contentions was that criminal charges were different from in rem forfeiture proceedings because criminal convictions required proof of scienter.<sup>739</sup> While the Court expressly declined to deal with the *Blockburger* issue, it did discuss the scienter element in in rem forfeiture and opine that such an element distinguishes in rem forfeiture from a punitive in personam conviction.<sup>740</sup> Such reasoning can be construed as the potential demise of a same offense argument. That is, the discussion of the different scienter element could conceivably be transplanted to *Blockburger* turf and bloom into the determinatively different *Blockburger* element.

In addition, Justice Kennedy indicated in his concurrence that he bought into the argument that the government advanced in *Ursery*—that "the criminal prosecution requires proof that a person, the defendant committed a crime, while the forfeiture requires proof that the property subject to the forfeiture has been involved in the commission of the criminal violation."<sup>741</sup>

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735. *Id.* (emphasis added).

736. *See supra* Part III.

737. *See supra* Part III.A.

738. *See supra* Part IV.C.

739. *See supra* text accompanying notes 601-06.

740. *United States v. Ursery*, 116 S. Ct. 2135, 2150 (1996).

741. *United States v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995). *See Ursery*, 116 S. Ct. at 2149 (Kennedy, J., concurring).

In this respect, the *Blockburger* word formula is not merely in abeyance. As formulated by Justice Kennedy, the government's *Blockburger* argument, swallowing the guilty property myth, has now gained an advocate.

While Justice Stevens alone properly used the *Blockburger* test to refute the government's "same offense" argument and also to deflate that new myth of non-separation, even he did not go far enough. In putting his imprimatur on the myth that not *all* civil forfeiture is punishment, Justice Stevens did what he accused the majority of doing—that is, disregarding precedent. As explained above, the *Austin* Court determined that § 881 conveyance and real estate forfeitures are by their very nature punitive.<sup>742</sup> All of the reasons behind *Austin* fit § 881(a)(6) forfeiture to a tee.

Specifically, one of the things that particularly piqued Justice Stevens was that the majority practically ignored the "innocent owner" defense, which was one of the big reasons that the *Austin* Court concluded that civil forfeiture imposed punishment.<sup>743</sup> In giving § 881(a)(6) special clout as the nonpunitive provision, however, Justice Stevens himself did not deal with the "innocent owner" loophole that aligns such forfeiture with the punitive conveyance and realty provisions.<sup>744</sup>

In rather tersely explaining that proceeds are not "property that [the owners] have a right to retain," Justice Stevens failed to grapple with the reach of the actual language in § 881(a)(6).<sup>745</sup> Because it permits forfeiture of "things of value" not just furnished," but "intended to be furnished . . . in exchange for a controlled substance" and of "moneys, negotiable instruments and securities," not just "used" but "intended to be used to facilitate any violation of [the] subchapter,"<sup>746</sup> the provision contemplates confiscation of even embryonically tainted property. That is, the provision potentially sweeps in property before the crime is even born, property that the owners have not yet lost a right to retain. Thus, by statutory definition, Justice Stevens' simile does not work because the property is not necessarily like "money stolen from the bank,"<sup>747</sup> but more attenuat-

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742. *Austin v. United States*, 509 U.S. 602, 621-22 (1993).

743. *Ursery*, 116 S. Ct. at 2159 (Stevens, J., concurring in part and dissenting in part).

744. 21 U.S.C. § 881(a)(6) (1994); see also *supra* Part III.B.2.

745. *Ursery*, 116 S. Ct. at 2152 (Stevens, J., concurring in part and dissenting in part).

746. See *supra* Part III.B.2.

747. *Ursery*, 116 S. Ct. at 2152 (Stevens, J., concurring in part and dissenting in part).

edly like money "intended to be" stolen from the bank.<sup>748</sup>

The lone dissenter, however, is the only one that acknowledged the real thrust of the *Halper*, *Austin* and *Kurth Ranch* decisions that the double jeopardy problem can be resolved by mandatory joinder:

I . . . cannot agree with the Government's view that there is any procedural obstacle to including a punitive forfeiture in the final judgment entered in a criminal case. The sentencing proceeding does not commence until after the defendant has been found guilty, and I do not see why that proceeding should not encompass all of the punitive sanctions that are warranted by the conviction . . . If, as we have already determined, the 'civil' forfeitures pursuant to § 881(a)(7) are in fact punitive, a single judgment encompassing the entire punishment for the defendant's offense is precisely what the Double Jeopardy Clause requires.<sup>749</sup>

The shortcoming here is that Justice Stevens still appears to be viewing the double jeopardy issue as one of separate multiple punishments. He did not, at least expressly, tap into what the *Torres* court implicitly grasped and what the *Kurth Ranch* Court intimated—that a civil proceeding that ends in punishment constitutes "the functional equivalent of a successive criminal prosecution" that can place the accused *in jeopardy* a second time.<sup>750</sup> In the *Ursery* and \$405,089.23 *U.S. Currency* decision, Justice Stevens honed in on the "jeopardy" language in the Clause itself<sup>751</sup> and deemed it significant and paid homage to the Clause's "protection against governmental overreaching."<sup>752</sup> Despite that, in his discussion of joinder he did not elaborate on whether he saw double jeopardy as precluding the government from putting the accused through multiple ordeals. Also, while Justice Scalia's concurrence repeats his view that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment,"<sup>753</sup> he declined to take that crucial second step and equate such forfeiture proceedings with a criminal prosecution.

In essence, the decision in *Ursery* and \$405,089.23 *U.S. Currency* is not just the derogation of precedent or the undoing of the *Halper*, *Austin* and *Kurth Ranch* salutary accomplishments.

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748. See *supra* Part III.B.2.

749. *Ursery*, 116 S. Ct. at 2163 (Stevens, J., concurring in part and dissenting in part).

750. *Department of Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (emphasis added).

751. *Ursery*, 116 S. Ct. at 2155 n.3.

752. *Id.* at 2163.

753. *Id.* at 2152 (Scalia, J., concurring).

It is, in truth, the worst judicial wielding of myths, one that dismantles a sacred constitutional protection. The tragedy is enhanced by the fact that the destruction of the sacred protection occurs just when and where it is most critical.

CONCLUSION: MYTHLESS FORFEITURE AND A MYTHLESS DOUBLE  
JEOPARDY CLAUSE

The decisions in *Halper*, *Austin* and *Kurth Ranch* effectually eradicated the traditional myths that made certain constitutional protections unavailable to the civil in rem forfeiture claimant. The *Halper* Court essentially overthrew the tyrannical legislative labels of "civil" and "remedial" and acknowledged that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law . . . ."<sup>754</sup> Under *Halper*, however, courts must conduct a case-by-case inquiry to ensure that the particular civil penalty imposed on a defendant that has already been punished is permissible. The question in each case is thus whether that penalty is rationally related to the goal of making the government whole.

The *Austin* Court went even further. It eliminated the ad hoc *Halper* approach with respect to civil in rem forfeiture and replaced it with the foregone conclusion that forfeiture is always punishment.<sup>755</sup> In so doing, the *Austin* Court solidified what the *Halper* Court inducted—the defeat of the once controlling "civil" and "remedial" labels that made the constitutional safeguards inaccessible to individuals subject to property forfeiture.<sup>756</sup> Significantly, in *Austin*, the Court also effectually disposed of the guilty property personification as a putative basis for treating the Double Jeopardy Clause as inapplicable to forfeiture.

Both the language in and procedural posture of *Kurth Ranch* should have had the effect of discouraging an attempt on the part of the government and the courts to avoid the double jeopardy prohibition by portraying the parallel criminal proceedings and civil in rem forfeiture actions, which both arise out of the same criminal offense, as a "single, coordinated prosecution."<sup>757</sup> Even more crucial, however, is the *Kurth Ranch* Court's incipient departure from the view of *Halper* that there is a sepa-

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754. United States v. Halper, 490 U.S. 435, 447-48 (1989). See generally discussion *supra* Part II.A.2.

755. See generally discussion *supra* Part II.B.2.

756. See *supra* text accompanying notes 125-40.

757. United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993). See also discussion *supra* Part III.A.4.

rate successive punishments bar built into the Double Jeopardy Clause. That is, although the *Kurth Ranch* Court recited that the "Double Jeopardy Clause protects against multiple punishments for the same offense,"<sup>758</sup> it ostensibly acknowledged what Justice Scalia harped on in his dissent—that the Clause's prohibition of a second prosecution logically subsumes the successive punishments' taboo.<sup>759</sup>

Although in *Halper*, *Austin* and *Kurth Ranch*, the Supreme Court effectually expunged the traditional myths that made constitutional provisions unavailable to civil in rem forfeiture claimants, several federal appellate courts nevertheless conjured up new ways to thwart forfeiture claimants' constitutional challenges.

According to some Circuits, the separate civil in rem forfeiture and criminal proceedings were not necessarily separate.<sup>760</sup> What makes this non-separation canard quite mythic is that it demands that courts buy into the fiction that two separate actions, each with its own docket number and each resulting in separate punishment, are somehow fused. Also, it is a fiction that can not peacefully coexist with the *Halper* and *Kurth Ranch* cases, which treated parallel criminal and civil cases as unequivocally separate.

According to the other circuits, all civil in rem forfeiture is not necessarily punitive.<sup>761</sup> The *Tilley* court's effort to lift drug proceeds forfeiture out of the *Austin* holding was similarly mythic. Although the *Austin* Court dealt with § 881 conveyance and real estate forfeitures, the *Austin* reasoning attached equally to the drug proceeds forfeiture provision at issue in *Tilley*. Also, because the drug proceeds forfeiture provision broadly sweeps in property "intended to be furnished . . . in exchange for a controlled substance" or "intended to be used to facilitate

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758. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.3 (1994).

759. *Id.* at 798-808 (Scalia, J., dissenting).

760. See generally *supra* Part III.A. (focusing primarily on the Second, Sixth and Eleventh Circuit decisions in *Millan*, 2 F.3d at 17, *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), and *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994). The Eighth Circuit, however, has aligned itself with this approach. See *United States v. Smith*, 75 F.3d 382 (8th Cir. 1996).

761. See generally *supra* Part III.B (focusing primarily on the Fifth Circuit decision in *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994)). The Third, Sixth and Seventh Circuits have aligned themselves with this approach. *United States v. \$184,505.01 In U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); and *Smith v. United States*, 76 F.3d 879 (7th Cir. 1996).

[a violation of the law]"<sup>762</sup> and because Congress intended that provision to be punitive, the *Tilley* decision was just plain wrong.

The Ninth and Seventh Circuits, later joined by the Tenth Circuit, were the federal appellate courts that appeared to most accept a mythless concept of civil in rem forfeiture. In *\$405,089.23 U.S. Currency*, the Ninth Circuit determined that the parallel civil forfeiture actions and criminal prosecutions are always separate and that civil forfeiture is always punitive.<sup>763</sup> In so doing, the Ninth Circuit decision abided by the Supreme Court's reasoning in *Halper*, *Austin* and *Kurth Ranch*.<sup>764</sup> Similarly, the Seventh Circuit rejected the mythic non-separate and non-punitive myths and even expressed that after *Kurth Ranch*, the Second Circuit and the Eleventh Circuit decisions can not be good law.<sup>765</sup>

What the Ninth and Seventh and Tenth Circuits also appeared to share is an awareness that the effect of *Halper*, *Austin* and *Kurth Ranch* was to require the government to seek forfeiture and the criminal punishment in a single indictment if it wishes to pursue both penalties.<sup>766</sup> Although the Ninth Circuit recognized that the effect of *Halper*, *Austin* and *Kurth Ranch* was to mandate such joinder and thus encourage greater reliance on criminal forfeiture, it still adhered to the belief that the double jeopardy problem is distinctly one of successive punishments. The Seventh Circuit, however, more openly indicated that it actually viewed the double jeopardy impasse as one of successive prosecutions. Specifically, the *Torres* Court apparently discerned the real implications of the *Kurth Ranch* Court's language, which equated a civil proceeding that results in a second punishment with a "successive criminal prosecution."<sup>767</sup>

The real disappointment is that in *Ursery* and *\$405,089.23 U.S. Currency*,<sup>768</sup> the Court refused to endorse what it already initiated in *Halper*, *Austin* and *Kurth Ranch*—that is, a mythless concept of civil in rem forfeiture with true double jeopardy protection. The Court should have recognized that civil in

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762. 21 U.S.C. § 881(a)(6) (1994). See also *\$405,089.23 U.S. Currency*, 33 F.3d at 1221, and discussion *supra* Part III.B.2.

763. 33 F.3d at 1210. Accord *United States v. 9844 S. Titan Court*, 75 F.3d 1470 (10th Cir. 1996). See also discussion *supra* Part IV.A.1. & IV.B.

764. See *supra* discussion Part IV.B.

765. *Torres*, 28 F.3d at 1465.

766. See generally discussion *supra* Part IV.B.

767. The term goes back to Justice Scalia's dissent in *Kurth Ranch*, 511 U.S. at 798. See also *Torres*, 28 F.3d at 1465 and discussion *supra* Part I.A and IV.B.

768. 116 S. Ct. 2135 (1996).

rem forfeiture is always punishment and that it is indeed imposed on a human being. Likewise, it should have expressly acknowledged that parallel civil and criminal proceedings are always separate. The Court should also have dealt with and obliterated the fledgling efforts to torture the *Blockburger* analysis into a limitation on double jeopardy protection.<sup>769</sup> Instead, the Court reincarnated the old forfeiture myths and reinstated the despotic reign of Congressional labels while it put the new myths on hold.

Further, the Supreme Court should have set forth a mandatory joinder rule, one which requires the government to seek both the forfeiture and criminal punishments in the same indictment. In fact, the Court needed to revisit some of the myths surrounding the Double Jeopardy Clause itself. As Justice Scalia suggested in his *Kurth Ranch* dissent, the Court should have questioned whether there even exists a *separate* prohibition of multiple punishments.<sup>770</sup>

The *Ursery* and \$405,089.23 *U.S. Currency* case was a perfect opportunity to move forward—to explore one of the real double jeopardy problems, which is not just the sort of tautology that Justice Scalia described when he said that “the Double Jeopardy Clause’s ban on successive criminal prosecutions . . . make[s] surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred.”<sup>771</sup> The more insidious problem that the Court should have confronted is that a *distinct* successive punishments’ bar can actually detriment the interests behind the Double Jeopardy Clause—the sacred finality guarantee and the implemented buffer between the accused and potentially oppressive government.<sup>772</sup>

It is, after all, not just the Court’s refusal to extend double jeopardy protection to the civil in rem forfeiture claimant exposed to multiple ordeals, but also its persistence in the notion that the Double Jeopardy Clause has a distinct successive punishments bar that enfeebles such a sacred constitutional protection. That is, if the double jeopardy violation is purely a successive separate punishments bar and the government omits to seek *both* punishments in the same indictment, then it logically follows that the government is not technically precluded from nevertheless attempting to punish an accused who has already

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769. See generally discussion *supra* Part IV.C.

770. *Kurth Ranch*, 511 U.S. at 798-803 (Scalia, J., dissenting).

771. *Id.* at 801.

772. See generally discussion *supra* Part I.A.

been acquitted of the same offense.<sup>773</sup> That, of course, makes an outright mockery of the whole concept of double jeopardy. In theory, such a *pure* successive punishments' "take" on the problem permits—and perhaps even invites—duplicative ordeals as long as they do not literally wind up with multiple separate penalties.

Any interpretation of the Clause that tolerates consecutive punitive ordeals furnishes the government with a mechanism for trampling upon the accused's right to finality and in so doing, gives the government a way to oppressively badger an inately vulnerable target. In fact, such a distinct successive punishments prohibition, one which permits *successive ordeals*, is especially toxic when one such ordeal involves the harsh and potent forfeiture mechanism.<sup>774</sup>

Because the Double Jeopardy Clause aims to equalize "the adversary capabilities of grossly unequal litigants,"<sup>775</sup> its safeguards are not just helpful or even just necessary—but absolutely critical—in a proceeding which, by its very nature, diminishes the accused and magnifies the seeming leviathan of government. The Court in *Ursery* and *\$405,089.23 U.S. Currency* should have taken that opportunity to make real peace with the salutary principles behind double jeopardy protection and acknowledge that a proceeding, such as forfeiture, imposes punishment and is a prosecution. Further, the Court should have acknowledged that the Double Jeopardy Clause has the *effect* of barring successive punishments because it *directly* bars successive prosecutions.

Further, mythlessness should really entail a re-examination of what has become a well-embedded incantation, that the Constitution permits the imposition of multiple punishments in a single proceeding as long as "the legislature actually authorized the cumulative punishment."<sup>776</sup> First, while multiple punishments in single proceedings may not present what the Double Jeopardy Clause prohibits—the redundant ordeal—that alone, does not mean that the Constitution automatically condones multiple punishments in a single proceeding. As Justice Scalia indicated, the Cruel and Unusual Punishment Clause and the Excessive Fines Clause restrict multiple punishment "insofar as

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773. See generally discussion *supra* Part II.A.2.

774. See generally discussion *supra* Part I.B.

775. Notes and Comments, *supra* note 49, at 278. See also discussion *supra* Part I.A.

776. *Halper*, 490 U.S. at 451 n.10. See also *supra* notes 53-54 and accompanying text.



its nature. . . [and] cumulative extent is concerned."<sup>777</sup>

Also, mythlessness should entail the Court taking a hard and critical look at what Justice Scalia suggested, that the Due Process Clause "require[s] that the cumulative punishments be in accord with the law of the land, *i.e.*, authorized by the legislature."<sup>778</sup> The Court should skeptically re-examine what Justice Scalia attributed to a cumulative punishment analysis under the Due Process Clause—namely, that well-accepted age-old deference to the legislature. In essence, the Court needs to seriously consider what Justice Stevens said in *Ursery* and \$405,089 *U.S. Currency*, that "Congress' decision to create novel and additional penalties should not be permitted to eviscerate the protection against governmental overreaching . . . ." <sup>779</sup> In fact, the Court should heed that admonition when pursuing all such constitutional inquiries.

All of this interpellation is not happening, but it indeed makes good sense. It is, after all, the fear of governmental tyranny that pervades the whole Constitution. Because Congress is a branch of government and even one that some scholars have denominated "the most dangerous,"<sup>780</sup> the legislature should not be exempt from any constitutional constraints on the exercise of power.<sup>781</sup> In fact, the abrogation of legislative deference in the multiple punishments' area would be entirely in harmony with the reasoning in both *Halper* and *Austin*.

In *Halper*, the government asserted that punishment can ensue only in a "criminal" proceeding and that statutory nomenclature is what decides whether proceedings are criminal or civil.<sup>782</sup> Although the Supreme Court admitted that "recourse to statutory language, structure and intent is appropriate in identifying the inherent nature of a proceeding," it concluded that courts can identify the constitutional violation only by analyzing the sanctions imposed on the actual individuals.<sup>783</sup> Also, the *Halper* Court stressed that the legislative label of "civil" did not necessarily transform a penalty into a non-penalty.

In *Halper*, the sum of the government's actual loss was \$585 plus its costs in investigating and prosecuting Halper's

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<sup>777</sup> *Kurth Ranch*, 511 U.S. at 805.

<sup>778</sup> *Id.*

<sup>779</sup> 116 S. Ct. at 2163 (1996).

<sup>780</sup> Calabresi & Rhodes, *supra* note 68, at 1156.

<sup>781</sup> See *supra* notes 62-70 and accompanying text.

<sup>782</sup> *Halper*, 490 U.S. at 441.

<sup>783</sup> *Id.* at 447.

false claims.<sup>784</sup> The district court concluded that "the authorized recovery of more than \$130,000 bore no 'rational relation' to the government's [costs]."<sup>785</sup> The Supreme Court, in fact, recognized that the disparity between the government's costs and Halper's *legislatively* authorized liability was indeed disproportionate and thus, could be deemed constitutionally infirm.

Although what directly concerned the *Halper* Court was that the sanction could be a *second* punishment in violation of the Double Jeopardy Clause, it is quite conceivable that the penalty, which was more than 220 times greater than the government's measurable loss, would also be impermissibly excessive—even if that penalty had been imposed in the same proceeding as the criminal sentence. This hypothetical, of course, is quite comparable to what the Court addressed in *Austin*—namely, a situation where a forfeiture, which although legislatively authorized, could be arguably "excessive" and thus, constitutionally proscribed.<sup>786</sup> As such, *Halper* and *Austin* afforded the Court a basis for chipping away at what now seems even more inveterately entrenched—the permissibility of legislatively authorized multiple punishments imposed in a single proceeding.

This article began with Shelley's Prometheus, who lamented his revenant agony.<sup>787</sup> What I there suggested was that Shelley had poetically crystallized what the Greeks equated with the quintessence of severe punishment—namely, redundant pain. In fact, it is precisely such an equation that inhabits our Double Jeopardy Clause.

What I now suggest in closing is that the Supreme Court had the opportunity to and should have welcomed a "Prometheus Unbound."<sup>788</sup> What this entailed was not just the demolition of the shackling forfeiture myths, but also the slaying of the

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784. *Id.* at 439.

785. *Id.* (citing *United States v. Halper*, 660 F. Supp. 531, 533 (S.D.N.Y. 1987)).

786. *Austin*, 509 U.S. 602. See generally discussion *supra* Part II.B.1.

787. See *supra* text accompanying note 2.

788. According to myth, Hercules killed the vulture that daily devoured Prometheus' liver and set Prometheus free:

The bird was killed by shapely Alcmena's heroic son Heracles, who delivered the son of Iapetus from his evil plight and released him from his sufferings, with the consent of Olympian Zeus the heavenly king, who wanted to raise even higher than before the fame of Theban-born Heracles over all the populous earth. This was his purpose; he exalted his son with honor, and angry though he was he laid aside his former feud with Prometheus.

See HESIOD, *supra* note 1, at 68.

Shelley based his *Prometheus Unbound* on Aeschylus' lost sequel, in which Prometheus made peace with his oppressor, but Shelley's poem was an allegory about the elimination of evil. See generally SHELLEY, *supra* note 2, at 981-83.

mythic vultures that have historically gyred the Double Jeopardy Clause itself. The Court, of course, should have held that if the government wishes to seek both forfeiture and criminal punishment for the same offense, it must do so in the single proceeding. The Court should, however, have gone further and abolished that successive punishments bar as a *distinct* double jeopardy problem. Also, the Court should have emphasized that even legislatively authorized multiple punishments imposed in a single proceeding can be excessive and disproportionate and thus, be constitutionally proscribed.

In sum, only through ushering in a truly mythless era for both civil in rem forfeiture and double jeopardy protection could the Supreme Court enjoin the seemingly deific prosecution from subjecting the accused to a perceived eternity of reprosecution and pain. Lamentably, after the decision in *Ursery* and \$405,089.23 U.S. Currency, there can be no Promethean relief or vindication.